

Truth and Knowledge in Law

The Integration Challenge

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Thesis Submitted for PhD

UCL

Signed Declaration

I, Miguel-Jose Lopez-Lorenzo confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

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Abstract

There is a challenge that needs to be addressed in general jurisprudence, and the challenge I have in mind is composed of two questions: one of these raises a metaphysical issue about what makes it the case that the law requires what it does—call that the *constitutive question*; the other question raises an epistemological issue about what it is to know what the law requires in the instant case—call that the *problem of legal knowledge*. Although these questions raise different issues that need to be addressed by general theories of the nature of law, my view is that they are best regarded as two facets of a larger problem: how, if at all, can we reconcile a plausible account of what makes it the case that the law requires what it does with a credible account of what it is to know what the law requires on a particular issue? That, in a nutshell, is the *integration challenge* confronting the legal domain, and my discussion of it proceeds as follows: I shall begin, in Chapter II, by introducing the integration challenge for the legal domain and demonstrating why that challenge merits scrutiny in philosophical discussions of the nature of law; I shall then establish, in Chapters III-IV, the *programme of legal dispositionalism* and its attendant *objectivity, relevance, and epistemological* conditions that constrain adequate solutions to this pressing theoretical problem; as I explain in Chapter V, the problematic is confounded here in that our two leading theories of the nature of law, the *orthodox view* and the *model of principle*, fail to negotiate those constraints satisfactorily in their respective accounts of what law is and how it works; so, in Chapter VI, I shall review the importance of taking up our challenge in earnest.

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To Madre, Padre, and Bro

I

A Problem to Start From

This is an essay in general jurisprudence, by which I mean the philosophical study of the nature of law. The discussion will be programmatic, for it is not my aim to advance a comprehensive theory of what law is and how it works; I rather want to rethink and delimit the puzzles that need to be addressed by just such a theory. I believe, more specifically, that there is an *integration challenge* confronting the legal domain; one which generates pressing issues that resist capture in the tradition of recent work undertaken by philosophers in this area. I shall therefore be attempting throughout to expound that challenge, and moreover provide a framework for its adequate solution. Initially, this may strike the reader as an excessively modest aim. In any case, as we shall see, to understand the integration challenge for the legal domain and appreciate the theoretical tasks that fall within its range is to make much progress in philosophical discussions of the nature of law as such.

‘It is the profession of philosophers to question platitudes that others accept without thinking twice.’¹ A similar story holds for general jurisprudence; for as soon as we begin to assemble truisms about law that we take to be self-evident, we start to find them puzzling, and question what law must be in order for those truisms to hold.

General jurisprudence is marked, however, by its irredeemably practical dimension. The central questions of our subject are not ‘puzzles for the cupboard, to be taken down on rainy days for fun’.² It matters, for instance, whether I have a legal right to sue my landlord, whether he has a legal obligation to fix my boiler, and how judges and other officials are to determine that issue. In this way our subject is at once theoretical and practical. To be sure we wish to make progress on some broad and abstract issues such as what it is to have a legal right and duty, how and why they come into existence, and how it is exactly that we determine their content. Yet our concern with these questions and others like them is not exhausted by their intrinsic interest. Jurisprudence matters because law matters, however abstract and general the former may be.

It is precisely in this spirit that I want to focus on a platitude that has been overlooked by philosophers working in this area. The platitude is this. There can be no doubt that lawyers and judges know things and are able to make judgements that

laypersons do not know and are unable to make; it seems clear, in other words, that lawyers and judges have superior knowledge of what the law requires in a given jurisdiction. By way of bringing this platitude into bolder relief, consider the following passage from Leo Tolstoy's *War and Peace*.

“My dear Princess Katerina Semyonovna!” Prince Vassily began speaking impatiently. “I have come to you not in order to exchange barbs, but in order to talk with you, as with a kinswoman, a good, kind, true kinswoman, about your own interests. I tell you for the tenth time that if the letter to the sovereign and the will favouring Pierre are among the count's papers, then, my darling, you and your sisters do not inherit. If you don't believe me, believe people who know: I've just spoken with Dmitri Onufrich” (this was the family lawyer), “and he says the same thing.”³

Here it finally dawns on Princess Katerina Semyonovna that she stands to lose her share of Count Bezukhov's considerable estate: notwithstanding Prince Vassily's repeated insistence that the Count's latest will suffices to pass over his direct heirs and bequeath all of his property to his illegitimate son, Pierre; only upon hearing that the Prince's estimation accords with that of the family lawyer, Dmitri Onufrich, does she truly become convinced. Presumably, this is because Dmitri Onufrich knows things and is able to make judgements about matters that Prince Vassily does not know and is unable to judge: his education and training gives him superior knowledge of what the law requires on this issue, to which the Prince appeals in his attempts to make the Princess aware of the threat to her inheritance.

But what is it exactly that Dmitri Onufrich knows that Prince Vassily doesn't? To be fair, the Prince was right all along about the effect of Count Bezukhov's will. As his subsequent entreaty that the Princess ‘believe people who know’ and her attendant realization that she may indeed be disinherited would appear to suggest, however, it seems platitudinous to hold that there is something more reliable, accurate, or otherwise superior about the judgements of lawyers and judges of what the law requires in a given jurisdiction as compared with those of laypersons.

In what does such knowledge consist, then? What is it to know what the law requires on a particular issue? There are numerous and powerful reasons for addressing that *problem of legal knowledge*, as I call it; but they fall into two groups: theoretical and practical. To begin with the latter, the indications are that the superior knowledge of

lawyers and judges at least goes some way to explaining why we solicit their advice, seek their representation in court, rely on them for the education and training of future lawyers, and appoint them to sit on cases. The upshot is that there is a very real sense in which the problem of legal knowledge speaks to a number of issues of considerable practical importance. How should we decide to appoint judges? What, if anything, makes their decision-making legitimate? What are the proper aims and methods of legal education? These, as we shall see, are just some of the pressing issues that call on us to explore what legal knowledge consists in. Rather than belabour the point here, however, let us take it as granted that the problem of legal knowledge matters.

The problem of legal knowledge, to be clear, raises an epistemological question about legal standards; that is to say, an epistemic issue about how we identify the existence and content of our legal rights and duties. The problem asks not, *What is it to have some legal right or duty in a given jurisdiction at a given time?* Instead, the problem asks, *What is it to know that the law includes some or other requirement on a given point? In what does such knowledge consist? How is it best characterized?*

The former question about what it is to have some legal right or duty, by contrast, raises a question that is metaphysical in nature. I refer to it in this essay as the *constitutive question*. The question presents us with a special instance of ‘metaphysical grounding’; that is, a particular issue about what grounds what.⁴ It is the kind of problem, in other words, that arises in ethics when we ask how promissory obligations obtain *in virtue* of descriptive facts about the utterance of certain phrases, and the kind of puzzle that emerges in the philosophy of language and mind as soon as we ask what *makes it the case* that our linguistic expressions and mental states have the semantic contents that they do.

The problem raised by the constitutive question, then, is this. What makes it the case that the law requires what it does? How is it exactly that legal rights and duties obtain in virtue of descriptive facts about what legislatures and courts have said and done? How is it that I have a legal right to sue my landlord, and he has a legal obligation to fix my boiler? What, if anything, makes that possible? How, in short, do facts make law?

As we shall soon observe, the constitutive question is where the action is currently believed to be in general jurisprudence, such that developing an answer to the problem of legal knowledge has not been a major focus in this area. On the contrary, it would be fair to say that this problem has either been largely ignored, or assigned a

secondary or tangential importance in philosophical discussions of what law is and how it works.

The upshot is that there are further, theoretical reasons for addressing the problem of legal knowledge. How should we conceive the nature and scope of this issue concerning what one knows when one knows the law? What counts as a satisfactory response to this pressing theoretical problem? How should we pinpoint the connection between the problem of legal knowledge, on the one hand, and the constitutive question on the other? And what, if any, impact might further reflection on these issues have on our understanding of the nature of law as such?

It is by addressing these questions that I hope to make my main contribution. For I shall be arguing that taking our problem about legal knowledge seriously requires us to accept that there is an integration challenge confronting the legal domain. We have, in other words, to provide a simultaneously acceptable answer to the constitutive question, on the one hand, and the problem of legal knowledge, on the other. In what follows, I shall bring that challenge into bolder relief. A moral or two will be drawn about some other arguments that have occasionally been advanced in this area, but the main thesis is a simple one: that the challenge *is* a challenge. And, as a corollary, that any account of the nature of law must ultimately come to grips with it. Any speculation as to solutions can be deferred.⁵

Notes to Chapter I

- 1 Lewis (1969: 1).
- 2 Dworkin (1977: 14).
- 3 Tolstoy (2009: 74).
- 4 For more on the general concept of metaphysical grounding, see Rosen (2010: 109). The relevance of this topic for the legal case is discussed in Plunkett (2012).
- 5 At the risk of redundancy, this statement of my thesis draws on Kripke (2011: 125).

II

An Introduction to the Challenge

I believe there is a pressing theoretical problem that needs to be addressed in general jurisprudence: the *integration challenge* for the legal domain. I therefore have the project in this chapter of introducing that challenge and demonstrating why it merits scrutiny in philosophical discussions of the nature of law. The discussion in what follows is preliminary, in that it is not my aim to solve the challenge presented here, and that a full appreciation of it depends unavoidably on the more detailed arguments to follow in subsequent chapters. Here, at any rate, I shall sketch some of the main ideas underlying the integration challenge for the legal domain that I wish to develop. In this way, the plan is to prepare the way for a more precise defence of my claim that the challenge is genuine and repays further study.

1. The Explanandum

I begin by presenting the *explanandum* that led me to consider the integration challenge for the legal domain.

It seems clear that lawyers and judges have superior knowledge of what the law requires in a given jurisdiction; take the formation of contracts in English law. Students beginning their studies often assume that every legally valid contract needs to be made in writing, and this no doubt reflects a common misconception among laypersons; but trained lawyers know better: that legally valid contracts are generally established on the basis of agreements that are supported by consideration and manifest an intention to create legal relations; the upshot being that although the conclusion of some contracts must be marked or recorded in a specified manner such as writing, oral contracts are for the most part just as binding as written ones.¹

A similar story holds as regards the law of property. Students beginning their studies and laypersons alike have an unfortunate habit of using ‘property’ to refer to things: their houses, cars, computers, and what have you; but trained lawyers know better: that this naive usage fails to reflect the fact that more than one type of property right can exist with respect to a particular thing; hence it constitutes an important barrier

to understanding the leases, easements, pledges, and other proprietary rights in respect of land or goods with which this area of law is concerned.²

Finally, take this example from the law of torts. People often speak of their being ‘assaulted’ when they are punched on the nose, say, and subjected to other such intentional and direct applications of force; but trained lawyers know better: that the essence of assault rather consists in conduct that leads the claimant to *apprehend* the application of such force, for instance when I shake my fist at you, which needless to say may or may not be accompanied by the relevant battery.³

Examples of this kind are easily multiplied, but let us refrain from doing so; let us simply take it as granted that lawyers and judges have superior knowledge of what the law requires in a given jurisdiction and, moreover, assume that this goes some way to explaining why we solicit their advice, seek their representation in court, rely on them for the education and training of future lawyers, and appoint them to sit on cases.

2. The Problem of Legal Knowledge

Our explanandum nevertheless generates a pressing philosophical problem, which I shall refer to hereinafter as the *problem of legal knowledge*.

In what does such knowledge consist? What is it to know what the law requires on a particular issue? We can dramatize this question: I presume that many readers consider themselves experts in discrete areas of law such as contract or crime; but what does this amount to exactly? What do you know when you know the law of contract, say? To the extent that you know anything about the legal rights, obligations, privileges, powers, and permissions that obtain in a given jurisdiction at a given time: what does this consist in exactly? What are the constitutive elements of this knowledge? How is it best characterized?

Suppose Valerie advertises goods for sale in a local newspaper; that Derek puts acid in a hand dryer so that it injures the next person to use it; and that Amy and Beth at the same moment inflict fatal injuries upon Cynthia. Does Valerie’s advertisement constitute an offer or an invitation to treat? do Derek’s actions amount to battery? and are Amy and Beth equally liable in full for the loss?⁴ It is undoubtedly the business of lawyers and judges to address such questions; to argue about what the law requires in the instant case, and thereby give reasons for thinking that their statements about the existence and content of legal standards are true or false. It is the regular business of lawyers and judges, in other words, to make *judgements* about what the law requires on

a particular issue, so we wish to understand the nature of the knowledge that enables them to do that.

A moment's thought suggests that this question speaks to a number of issues of considerable practical importance, so the general motivation to address it is not hard to discern; indeed, the controversies surrounding how we should decide to appoint judges, the legitimacy of their decision-making, and the proper aims and methods of legal education, in particular, are just some of the pressing issues that call on us to explore what legal knowledge consists in; for if their having such knowledge partly explains why judges are appointed, and furthermore contributes to the legitimacy of their political power to make judgements of what the law requires in the instant case, then we need to know what that knowledge amounts to; and if the potential to develop such knowledge is what we are looking for in selecting prospective candidates to read law degrees, and moreover what we try to impart to them as teachers when they arrive at university, then we need to know in what that knowledge consists.⁵ To be sure, very similar considerations apply to academia. Many readers, as I say, no doubt consider themselves experts in discrete areas of law, and are expected to disseminate their knowledge in learned journals and books. So much as this is not disputed; and yet it still falls very far short of determining what legal knowledge amounts to exactly. Rather than belabour the point, then, let us take it as granted that the problem of legal knowledge matters.

I should be clear, before we proceed, that I am here using 'knowledge' in an ordinary, non-technical way. True, there is no consensus on how we should, or even whether we can, analyse this central concept in philosophy,⁶ but that is largely irrelevant to our concerns. Later on, to be sure, I shall have to be more explicit about why in raising the problem of legal knowledge we do not have to rely on any one favoured proposal concerning how we should understand 'knowledge' in the strict sense; before getting to that, however, I want to press on with an intuitive statement of the problem as it features in the larger integration challenge for the legal domain.

I should also be clear, in so doing, that my focus is restricted to the general question of what it is to know what the law requires on a particular issue. This is a controversy about the nature of legal knowledge *as such*; knowledge which by hypothesis is common to all lawyers in different jurisdictions, and may therefore in principle be studied fruitfully independently of the particular content of the doctrines enforced in this or that legal system. The best way of doing that, it seems to me, is by enquiring into the nature of the knowledge necessary to consider a fact situation and

propose an assessment of the legal rights and duties concerned. Granted the acquisition and application of such knowledge is only part of what is involved in ‘thinking like a lawyer’; advocates, for instance, have also to be aware of certain tactical or strategic considerations when representing their clients; and the practising lawyer more generally has reason to be concerned with legal procedure in a way that is seldom appropriate or necessary in the academic study of law. Restricting our focus in this way, however, has its advantages: it enables us to concentrate our enquiry on the irreducible core of what every lawyer does and every law student learns to do, namely to consider a fact situation and assess its legal significance, which in turn promises to yield the sufficiently general insights that are of interest to philosophers of law.

3. The Constitutive Question

To get a sense of the issues involved, consider the following example from trusts law doctrine. We suppose Jack wishes to settle Blackacre upon Jill under a trust. Broadly speaking there are two options available to Jack: either he conveys the land to someone willing to act as trustee, or he declares himself a trustee;⁷ to be sure, the upshot in both scenarios is that equity will regard the legal owner of Blackacre as holding it on trust for the benefit of Jill.⁸ Continuing with our example, then, we suppose Jack pursues the second option by making an oral declaration to the following effect, ‘Henceforth, I hold Blackacre on trust for Jill.’ Does this suffice to create a valid trust of land in English law? As we have seen, it is the regular business of lawyers and judges to make this kind of judgement; so how should we characterize the knowledge required to determine the issue?

At first blush, the answer seems remarkably simple: as every undergraduate knows, there are certain ‘sources of law’ in a given jurisdiction—certain acts or events, such as the enactment of statutes and the adjudication of cases—the effect of which is to create the legal rights and duties that obtain in a given jurisdiction at a given time;⁹ accordingly, determining what the law requires on a particular issue is oftentimes no more complicated a matter than locating the relevant sources, and reading what they say;¹⁰ certainly there will be those cases where an exercise of judgement is required, a complex legal analysis of how the existing law applies to novel fact situations, but in the case of Jack we need do little more than identify section 53(1)(b) of the Law of Property Act 1925,¹¹ which states quite plainly that, ‘A declaration of trust respecting

any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.’

Yet things are not so simple. Put to one side a moment the more complex legal analyses envisaged above,¹² and let us focus our attention squarely on the example of Jack’s failed trust of Blackacre; our question about legal knowledge is just as difficult in ostensibly ‘cut and dry’ cases such as these; not least since it bears an intimate relation to a foundational problem of legal theory.

The foundational problem in question, the *constitutive question* as I shall call it, speaks to our starting assumption that legal rights and duties owe their existence and content to certain sources of law in a given jurisdiction.¹³ As I say, everyone is agreed that an adequate answer as to whether Jack is legally required to manifest and prove his declaration of trust in writing must make reference to enacted statutes and decided cases, which are understood for present purposes as certain descriptive facts about what legislatures and courts have said and done; and yet, notwithstanding their cogency, these assumptions appear to give rise to a pressing theoretical problem. On the one hand, there seems to be little difficulty in identifying the Law of Property Act 1925 as being especially relevant in determining whether English law requires Jack to manifest and prove his declaration of trust in writing;¹⁴ on the other hand, how did this magic happen? How is it possible that merely descriptive facts—for instance, that 150 Members of the House voted in a certain way, or that judges as a matter of settled practice are not disposed to enforce oral declarations of trusts of land—*make it the case* that Jack is legally required to manifest and prove his declaration of trust in writing? Furthermore, even if we agree that enacted statutes and decided cases are relevant in determining what the law requires on a particular issue, it still seems pertinent to ask: how and why is that so? What makes them relevant? Indeed, what is it exactly *about* the enactment of statutes and the adjudication of cases that constitutively explains how and why these practices generate the normative standards—the legal rights and duties—that obtain in a given jurisdiction at a given time?

With minimal effort, we can see why the problem of legal knowledge is equally pressing in this connection; for although it seems clear that lawyers and judges have superior knowledge of what the law requires in a given jurisdiction, and that this goes some way to explaining why we solicit their advice, seek their representation in court, rely on them for the education and training of future lawyers, and appoint them to sit on cases; it is by no means clear in what such knowledge consists: *what* do you know *when* you know that English law requires Jack to manifest and prove his declaration of trust in

writing? No doubt you know that Parliament has *enacted* the Law of Property Act 1925, and your command of English puts you in a position to know what section 53(1)(b) *says* about trusts of land; but clearly you know much more than this, because you are able to determine the legal significance of those descriptive facts of political practice and language. What you are able to do offhand, it seems, is ascertain how those facts affect the obtaining of certain legal rights and duties: you understand immediately why it is that they generate a concrete outcome in Jack's particular case, and you are able, moreover, to rule out those countervailing considerations that may be applicable in this connection. How should we understand this knowledge, then? Why are you able to grasp '*in a flash*' the legal significance of merely descriptive facts about what legislatures and courts have said and done?¹⁵ What, if anything, makes that possible? Lest we make do with platitudes about what it means to 'think like a lawyer', the problem of legal knowledge demands that we have something more constructive to say.

4. The Datum of Mistake

Doing just that requires us to be clear on how the constitutive question and the problem of legal knowledge are related. As we shall see, this is a matter of some complexity: the nerve of the integration challenge for the legal domain is that the constitutive question and the problem of legal knowledge are best regarded as two facets of a larger puzzle, so the connections between them need to be spelt out with some care.

The first thing to say here is that although it bears an intimate relation to the constitutive question, for an obvious reason the problem of legal knowledge is strictly speaking not the same. This is because the former raises a *metaphysical* issue: how is it exactly that legal rights and duties obtain in virtue of descriptive facts about what legislatures and courts have said and done? whereas the latter raises an *epistemological* issue: in precisely what does the knowledge required to ascertain the existence and content of these normative standards consist?

By way of illustration, consider again the example of Jack's failed trust of Blackacre. It is one thing to provide an account of what makes it the case that some fact *p* holds about what English law requires Jack to do with respect to his trust of land; it is quite another thing to elucidate the constitutive elements of our knowledge that *p*. As George Pavlakos notes, 'Knowledge requires that we do not always get things right;'¹⁶ although our thinking or believing that *p* is closely connected to the fact that *p*, it is not itself identical with that fact; on the contrary, everyone makes mistakes, and lawyers are

no exception: judges get the law wrong, students overlook salient authorities in their examinations, and sometimes lawyers fail to spot important differences between two cases. All of this necessitates the possibility of there being some logical space between our thinking or believing that p and the fact that p : the very possibility of being *mistaken* about what the law requires, in other words, necessitates there being some logical space between our judgements of what it requires and what it in fact requires, so the constitutive question and the problem of legal knowledge cannot be considered identical. Call that the *datum* of mistake or error about the existence and content of legal requirements.

5. The Case for Primacy

Therein lies what strikes me as the best possible justification for the way philosophers have, until now, devoted a disproportionate amount of attention to the constitutive question and thereby treated the problem of legal knowledge as its poorer cousin; that is to say, the unfortunate tendency there has been in general jurisprudence, either to ignore altogether this epistemological issue of what it is to know what the law requires on a given point, or to assign it a secondary or tangential importance. I shall refer to this hereinafter as the *case for primacy*; but before we confront it directly, and moreover explore how it turns on the datum that lawyers and judges can be mistaken about what the law requires in the instant case, I daresay some background is needed on the essential features of the current paradigm that guides and constrains general theories of what law is and how it works.

On this way of proceeding, the questions that matter in general jurisprudence are primarily metaphysical and only secondarily epistemological ones. Chief among these, of course, is the constitutive question, which has been firmly on the agenda of legal philosophers for some time now; hence the impressive work that has emerged on this metaphysical issue of how it is exactly that legal rights and duties obtain in virtue of descriptive facts about what legislatures and courts have said and done.¹⁷ Although it oversimplifies, we can understand these contributions as having the aim of advancing one of two broad perspectives on the constitutive question: the *orthodox view*, on the one hand, and the *model of principle*, on the other.¹⁸ To the left, as it were, stands that version of legal positivism, which finds its best expression in the work of Joseph Raz,¹⁹ and holds that the existence and content of legal standards are constitutively determined by an interrelated set of rules or norms that mandate or permit some action; to the right,

by contrast, stands the interpretivist theory of law that is most closely associated with the work of Ronald Dworkin, which has it that certain moral principles make it the case that the law requires what it does.²⁰ To be sure, both positions are widely acknowledged to have their difficulties, and the debate continues as to which of the orthodox view and the model of principle has the better of the argument—the claims, for instance, that the model of principle renders law ‘esoteric’,²¹ and that the orthodox view fails to leave sufficient room for mistake or error about what the law requires in a given jurisdiction have been much discussed;²² likewise with respect to the objections that the model of principle individuates legal obligations far too coarsely,²³ and that the orthodox view endeavours to define the subject matter of legal obligation on the basis of a contestable version of conceptual analysis.²⁴ The present point is not to endorse any of these respective criticisms of the orthodox view and the model of principle, nor is it to deny that much more could and needs to be said here; the point is merely that in light of the extensive attention that these issues have received in the relevant literature, it should be uncontroversial that it is the constitutive question, *not* the problem of legal knowledge, where the action is currently believed to be.

I should be clear that epistemological questions about legal standards have not been wholly absent from these discussions. As Frederick Schauer points out,²⁵ a vast and complex literature exists on the nature of legal reasoning—one which is organized around the question whether there is a form of reasoning distinctive to lawyers: whether they ‘think, reason, and argue differently from ordinary folk’ who consider the same issues or situations—and in the work of Scott Shapiro and Mark Greenberg, there is an explicit acknowledgement that metaphysical theses about the nature of legal standards are indeed constrained by what they entail for the practice of interpreting legal texts. This is the ‘*implication question*’ that Shapiro takes up in the second half of *Legality*, where his aim is to show how his *planning theory of law* squares with a credible view of the practice of legal interpretation;²⁶ and, in his most recent work, Greenberg has undertaken precisely the same task in connection with his *moral impact theory of law*.²⁷ Assuredly these enquiries aim at some generality and should, consequently, be distinguished from studies of legal method, by which I mean the sort of thing discussed in pedagogical texts that aim at instilling in students the techniques and skills necessary to study or practise law effectively;²⁸ for philosophers examining legal reasoning and the implication question are concerned with the nature of legal reasoning *as such*; reasoning which by hypothesis is common to all lawyers in different jurisdictions, and may therefore in principle be studied fruitfully independently of the particular content of

the doctrines enforced in this or that legal system: in a word, they study the characteristic techniques of lawyers and judges in determining what the law requires on a given point—such as reasoning by analogy, statutory construction, and arguing from precedent—not so as to practise them better, but to arrive at general truths about what it means to ‘think like a lawyer’.

All the same, proceeding in this fashion gives enquiry into the nature of legal knowledge a very particular cast. To flesh this out, such enquiry is split into two discrete parts: first and foremost the concern is to get our constitutive explanations of legal standards *just right*; only *then* do we proceed to consider the ramifications of these accounts for the epistemic questions surrounding the nature of legal reasoning and the implication question—the thought, more specifically, is that if the orthodox view is correct that legal standards are constituted by the existence and content of an interrelated set of rules or norms, then the epistemological questions that interest us would necessarily have to deal with more general philosophical puzzles about the nature of the judgements involved in the correct application of a rule; by the same token, if the model of principle is correct that legal standards are constituted in part by moral truths or facts about the substantive impact made by enacted statutes and decided cases on what we ought to do, then our accounts of legal knowledge would inevitably have to track those offered by moral epistemologists who are concerned to explore the possibility and character of knowledge in the moral domain.²⁹ Either way, it seems that the constitutive question is where the action is, since by hypothesis it defines the relevant subject matter and, thereby, sets the agenda for an intelligible discussion of the epistemological questions that interest us; hence the secondary importance assigned to the issues that are generated by the problem of legal knowledge.

The way all of this connects with the datum that lawyers and judges can be mistaken about what the law requires in the instant case is really quite simple; seeing that the motivation for bifurcating metaphysical and epistemological questions about the nature of legal standards no doubt tracks an important truth. If there are no facts of the matter about what the law requires on a given point, it follows that legal knowledge would not have so much as a subject matter, such that it would remain unclear what legal knowledge is or could be about; the upshot is that there are very good reasons for students of legal knowledge to be concerned with its objects, which make no mistake should include study of whether there are indeed facts or truths about what the law requires in a given jurisdiction,³⁰ and moreover how, if at all, they obtain in virtue of descriptive facts about what legislatures and courts have said and done. Indeed, since

intermediate links establish the connection between individual judgement and case in the legal domain, there must be some logical space between our judgements of what the law requires, and what it in fact requires. To hold otherwise, and thereby study the problem of legal knowledge in isolation, would be to hurry enquiry into what it is to *know* the law before understanding what there is to be *known*.

6. Links in the Chain

The case for primacy is unconvincing, however, and we do better to take a different view of the relation between the constitutive question, on the one hand, and the problem of legal knowledge, on the other. Certainly we have to accept a rough-and-ready distinction between truth and knowledge in law—between metaphysical questions about how legal standards obtain and epistemological questions about how legal standards are known to obtain—but we should not take the boundary too seriously: notwithstanding the datum of mistake or error about the existence and content of legal requirements, the way philosophers have, until now, devoted a disproportionate amount of attention to the constitutive question and thereby treated the problem of legal knowledge as its poorer cousin is deeply unsatisfying in two respects.

One problem with the two-step approach to the constitutive question and the problem of legal knowledge that underlies the case for primacy is that the epistemological issues that are generated by the latter, insofar as they get addressed at all, are gerrymandered into discussions of the nature of legal reasoning or the implication question of how we should square metaphysical theses about the nature of legal standards with a credible view of the practice of interpreting legal texts; this, however, is misconceived and thus constitutes an important barrier to making progress on them.

To begin with, although the topic of legal reasoning is intimately related to the problem of legal knowledge; strictly speaking it is not the same. Nobody interested in the nature of legal knowledge can ignore philosophical discussions of the nature of legal reasoning, since they contain many insights about what it is to reason with rules, to treat certain standards as authoritative, and to interpret those provisions couched in vague language;³¹ all or none of which, I should add, may or may not, in the final analysis, hold the key to explaining what one knows when one knows the law. Yet the problem of legal knowledge does raise a further set of issues. Suppose we could fully specify what it is to master the characteristic techniques of lawyers and judges in determining what

the law requires on a given point, such as reasoning by analogy and arguing from precedent. Suppose further that, in so doing, we could arrive at a full appreciation of how lawyers, by hypothesis, think differently from laypersons who consider the same fact situations. None of this would yet be to raise the question whether mastery of such techniques amounts to ‘knowledge’ in the strict sense and, if so, what its constitutive elements are or how it is best characterized. To give just one example of the kind of question that would need to be addressed in this connection, philosophers commonly distinguish between *knowledge-how* and *knowledge-that*: between the practical knowledge involved in knowing how to do something, for example playing chess, and the propositional knowledge that some fact obtains; for instance that the Shard is currently the 92nd tallest building in the world.³² Should legal knowledge, then, be characterized as an instance of the former, the latter, or some combination of the two? and how, if at all, might our take on this controversy constrain the plausibility of candidate answers to the constitutive question? To be moved by these concerns is at once to take seriously the problem of legal knowledge, and to be willing to address issues further to those currently discussed in the literature on the nature of legal reasoning.³³

Furthermore, although a step in the right direction, to answer the implication question is not yet to address the problem of legal knowledge. On the contrary, when Shapiro and Greenberg take up the practice of interpreting legal texts, what they seem to be addressing is a narrow question in the theory of adjudication, which is far removed from the ones I have tried to raise thus far. This much is evident from the examples of the kind of controversies used to motivate their enquiries. Shapiro, for instance, motivates his focus on the implication question by considering some prominent disagreements about how to interpret the US constitution, such as whether article 8 secures the constitutionality of the death penalty;³⁴ and Greenberg is similarly exercised by what, if any, role linguistic considerations have to play in the practice of interpreting legal texts, such as whether the exchange of a gun for drugs constitutes the ‘use’ of a firearm for the purposes of a federal statute.³⁵ There are, of course, very good reasons for philosophers of law to ask this question about the role of language in adjudication: practically speaking, it would seem highly pertinent to the issue of the legitimacy of judicial decision-making; and theoretically speaking, the more specific controversies discussed by Shapiro and Greenberg also act as helpful test cases for their planning and moral impact theories of law respectively. Yet the focus of the implication question is too narrow. To examine how judges interpret legal texts is not yet to explain the

knowledge or underlying capacity that enables them to do that. Furthermore, since legal knowledge is neither the exclusive property of judges, nor is it obviously *exclusively* a matter of interpreting texts of some description, we would have to broaden our enquiry to include academics, lawyers, and law students in our attempts to elucidate its constitutive elements, and moreover attend to a further set of issues: what is it to know what the law requires on a particular issue? Should it be characterized as an instance of knowledge-how, knowledge-that, or some combination of the two? How, if at all, might our answer to this question constrain metaphysical theses about what legal standards are and how they obtain? Although a step in the right direction, then, it should be uncontroversial that existing attempts to answer the implication question have not touched on these issues. To be moved by them is at once to take seriously the problem of legal knowledge, and to be willing to address issues further to those currently discussed in the literature.

The second and more important problem with the case for primacy is that it is by no means clear how by continuing in this vein we could ever account for our explanandum that lawyers and judges have superior knowledge of what the law requires in a given jurisdiction. Presumably, the characteristic techniques of lawyers and judges in determining what the law requires on a given point—such as reasoning by analogy, statutory construction, and arguing from precedent—are reliable methods for ascertaining what the law requires in the instant case: that their superior knowledge is, somehow, to be explained in terms of a systematic link that obtains between their actual methods of forming judgements about what the law requires, and what it in fact requires. Doubtless these methods are imperfect; lest, of course, we renege on the datum of mistake or error about the existence and content of legal requirements. It does not follow, however, that we best address the constitutive question and the problem of legal knowledge in two discrete steps: that the very possibility of there being mistake or error about the existence and content of legal standards necessitates that our accounts of them proceed *first and foremost* by explaining how it is exactly that descriptive facts about what legislatures and courts have said and done constitute the legal standards that they do for only *then* can we intelligibly raise the further or secondary question of what it is to know that the law includes such requirements. Far from it: we must not prioritize an enquiry into the *objects* of legal knowledge at the expense of an enquiry into its *nature*. To establish that there is an objective domain of facts about what the law requires in a given jurisdiction, and moreover arrive at some understanding of how those facts are constituted, is not yet to explain how we attain knowledge of them; still less in what

such knowledge consists. This is because even if we addressed each and every metaphysical puzzle or misgiving about our subject matter, and thereby established facts about legal standards as objects of genuine knowledge, there would still be a vital question to ask about how our actual methods of identifying their existence and content results in such knowledge, and how that is best characterized. Granted the very possibility of legal knowledge depends on there being some asymmetry between individual judgement and case in the legal domain: that intermediate links establish the connection between the two; but surely: are we not owed some explanation of what these links are, in what they consist, and how if at all they account for the explanandum that lawyers and judges have superior knowledge of what the law requires in a given jurisdiction? These are the questions that need to be addressed by an enquiry into not just the objects but also the nature of legal knowledge. To be moved by them is at once to take our explanandum seriously, and thereby be receptive towards an integrated approach to the constitutive question, on the one hand, and the problem of legal knowledge, on the other.

7. On the Very Idea of an Integration Challenge

I believe that the constitutive question and the problem of legal knowledge are best regarded as two facets of a larger puzzle: my central thesis is that general jurists simply must attend to the task of providing a simultaneously acceptable answer to both of these questions. The main conclusion I have tried to reach thus far is that if we continue to devote a disproportionate amount of attention to the constitutive question and thereby treat the problem of legal knowledge as its poorer cousin, it is by no means clear how we could ever account for our explanandum that lawyers and judges have superior knowledge of what the law requires in a given jurisdiction. Against that background, I can now attend to the positive task of adducing the reasons there are for believing that there is an integration challenge confronting the legal domain: in other words, how taking our explanandum seriously requires us to accept that our pre-theoretical conception of law is such that we should expect or anticipate a simultaneously acceptable metaphysics and epistemology of legal standards.

I shall argue for this thesis directly in the next section. There my aim is to show how the challenge of reconciling a plausible answer to the constitutive question with a credible answer to the problem of legal knowledge emerges quite naturally given certain truisms about what law is and how it works; and I shall further try to show how

adopting this integrated perspective on our two main questions markedly improves the prospects of accounting for the explanandum with which we began.

Before getting to that, however, I want to lay an appropriate foundation for this discussion by examining in more general terms the very idea of raising an integration challenge for a given domain or subject matter. To be more specific, my aim is to consider the basic structure or underlying form of some integration challenges that arise in certain other areas of our thought and talk about the world. This detour is necessary: first, because it has the virtue of enabling me to make connections with related puzzles in a number of diverse areas of philosophical enquiry; secondly, because it aids in my laying bare the unexceptional background assumptions or starting premises that underlie our problematic.

Let us start with modality, then. All of us make judgements about how things could, must, or could not have been: when Anne reflects, for instance, that she might have been a doctor rather than a lawyer she accepts that there are, in fact, many different ways the world could have been; and when she asserts that all bachelors are unmarried or that something cannot be red and green all over, we take her, presumably, to be reporting facts that are not only contingently but necessarily true. To the extent that such modal facts obtain, what if anything makes them obtain? *Modal realism* is a thesis that is most closely associated with the work of David Lewis, which is pre-eminent in philosophical discussions of the metaphysics of modality.³⁶ The basic idea is that the actual world we inhabit is one among a plurality of possible worlds where flamingos play chess, for example, and Napoleon lost the battle of Austerlitz. We do not understand Lewis aright if we regard such states of affairs as spurious or altogether fictitious. This is because modal realism precisely depends on the thought that these states of affairs do indeed obtain; albeit in possible worlds that are spatially, temporally, and causally discontinuous with ours. The main way this is supposed to improve our understanding of modal concepts, of course, is by enabling us to analyse necessity, and derivatively the notions of possibility and contingency, with reference to possible worlds; such that a proposition p is necessarily true just in case p is true in all possible worlds, and p is possibly or contingently true just in case p is true in some possible world. A number of criticisms have been levelled against Lewis's thesis, however, the most pertinent of which for present purposes is that it is by no means clear how modal knowledge is possible, given the truth of modal realism. That she might have been a doctor and that all bachelors are unmarried are presumably modal facts known by Anne, which moreover enter into her decision-making and reasoning; so how is it possible for

her to know them when they obtain, by hypothesis, in possible worlds that are spatially, temporally, and causally discontinuous with ours? In a word, the problem is that if we follow Lewis and thereby commit to realism about possible worlds, the indications are that modal truth is rendered radically inaccessible; hence the numerous attempts in the literature to account for modal truth in a way which also explains how it is possible that we have the modal knowledge that we seem to have.³⁷

Consider next the intentional contents of our own mental states. Thoughts and beliefs are paradigmatic examples of what philosophers call *propositional attitudes*. These can be about or refer to things, so they exhibit the property of intentionality. Take my belief that all ravens are black. My belief is about or refers to large passerine birds. My belief also has a particular content, in that it presents these birds as being a certain way. This intentional content can be evaluated for truth or falsity: the content of my belief is true or false depending on whether or not all ravens are black. It is by no means clear, however, what it is exactly that constitutively determines the intentional contents of our beliefs and other propositional attitudes. Consider again my belief about ravens. Concepts are among the constituents of this propositional attitude. I cannot form my belief that all ravens are black unless I have and deploy the concept RAVEN.³⁸ Given that the intentional content of my belief is essentially composed of this concept, a constitutive explanation of why my belief has the intentional content that it has simply must explain what makes it the case that it involves the concept RAVEN. *Externalism* about mental content is the view that the intentional contents of our beliefs and other propositional attitudes constitutively depend on the environment. What makes it the case that my beliefs involve the concept RAVEN, on this view, is that they typically token large passerine birds with a discrete genetic profile: to mimic some well-known thought experiments of Hilary Putnam and Tyler Burge, the basic idea is that if my doppelgänger finds himself in a community where RAVEN was extended to cover all corvids—such as crows, jays, and magpies—then he would not have the concept RAVEN, but some other concept, THRAVEN.³⁹ Externalism about mental content is a constitutive explanation of the intentional contents of our own mental states that commands a wide following. Metaphysically speaking, once we accept that it is partly in virtue of complex relations with the environment that our thoughts involve some particular concepts, it becomes much easier to account for mistake or error in their application and, moreover, account for certain problematic cases of *incomplete understanding*: those cases where a subject can have thoughts involving a particular concept without fully grasping or having mastery of that concept; such as the benighted

rube in Burge's example who has thoughts involving the concept of arthritis, notwithstanding his belief that he has the condition in his thigh.⁴⁰ It is also widely agreed, however, that externalism is subject to epistemological objections. Perhaps the most serious of these is that it remains incompatible with the, by hypothesis, privileged self-access that subjects have to the intentional contents of their thoughts, beliefs, and other propositional attitudes.⁴¹ I am not an ornithologist, and so cannot specify what it is exactly that makes a raven a raven. In writing this paragraph, however, I have presumably entertained thoughts about them, and moreover know *that* I am thinking about them; even though I am unaware of the relevant environmental factors, such as the genetic profile of ravens, or how the experts refer to them in my community. The pressing epistemological challenge confronting externalism, then, is to explain just how any of this is possible. If the contents of mind are individuated externally, it is by no means clear how I can know the contents of my own thoughts and all the while be ignorant of how things are in the world. To be sure, in recent years some impressive ways of addressing this puzzle have emerged; but much more still needs to be said here.⁴²

Finally, consider statements about the past.⁴³ 'After the battle of Borodino, the French occupied Moscow and deliberately set fire to the Russian capital.' There has been controversy ever since 1812 as to who was responsible for the fires in Moscow, which broke out soon after Napoleon entered; and this is essentially due to a lack of conclusive evidence.⁴⁴ Does it follow that there is no fact of the matter about whether the French engaged in deliberate arson? Intuitively speaking, the answer would seem to be no. To be sure, epistemologically speaking, the lack of evidence entails that we may be forever unable to determine the issue; assuming no new source material comes to light. Metaphysically speaking, however, it would be wrong to conclude that there is no fact of the matter about who was responsible for the fires in Moscow. Quite the opposite: suppose counterfactually that we located a source confirming the legend that Rostopchin, who served as governor of Moscow at the time, ordered the Russians themselves to destroy the holy city with a view to halting the French advance. It is decidedly *not* the availability of this source that makes it the case that the Russians set fire to Moscow; that role, it seems, is rather reserved for those facts or events that are disclosed in the material source. The upshot is that our ordinary conception of what is involved in the truth of statements about the past generates a puzzle that merits further scrutiny: so long as we remain committed to the idea that the truth of such statements is not constituted by our ordinary methods of finding out about the past—that the truth of

the past outruns our knowledge of it, in other words—we have to explain how it is possible that we can attain knowledge of states of affairs of a kind that, on occasion, obtain unverifiably.⁴⁵

The present point is that we should be starting to see a pattern here. Controversies about modality, the intentional contents of our own mental states, and statements about the past are just some among numerous other puzzles in philosophy that behove us to provide a simultaneously acceptable metaphysics and epistemology of a given subject matter. As Christopher Peacocke writes in *Being Known*:

In a number of diverse areas of philosophy, we face a common problem. The problem is one of reconciliation. We have to reconcile a plausible account of what is involved in the truth of statements of a given kind with a credible account of how we can know those statements, when we do know them.

The problem of reconciliation may take various forms. We may have a clear conception of the means by which we ordinarily come to know the statements in question. Yet at the same time we may be unable to provide any plausible account of truth conditions knowledge of whose fulfilment could be obtained by these means. Alternatively we may have a clear conception of what is involved in the statements' truth, but be unable to see how our actual methods of forming beliefs about their subject matter can be sufficient for knowing their truth. In some cases we may be unclear on both counts. I call the general task of providing, for a given area, a simultaneously acceptable metaphysics and epistemology, and showing them to be so, the *Integration Challenge* for that area.⁴⁶

It might seem that in raising an integration challenge for a given subject matter we have to rely on some contentious philosophical doctrines, but nothing could be further from the truth. It is of the utmost importance, more specifically, to distinguish between the *theoretically* and otherwise more *naively*-driven reasons there are for the demand that we reconcile our theory of truth in an area with the actual means by which we come to know truths in that area. *Realists*, *anti-realists*, *deflationists*, and those committed to certain other prior general theories of the nature of truth, to be sure, may very well have their own reasons for demanding just such a simultaneously acceptable metaphysics and epistemology of the facts, properties, or states of affairs that are associated with any one specific domain;⁴⁷ and I daresay a similar story holds for someone with antecedent commitments to some global theory of knowledge or understanding, such as *reliabilism*.⁴⁸ In any case, the putative (de)merit(s) of any such doctrine is neither here

nor there when it comes to raising an integration challenge for a given subject matter, and we can illustrate the point by examining mathematical judgements.⁴⁹

Consider a ‘rampant’ version of *Platonism*, the gist of which is that mathematics studies abstract objects.⁵⁰ This makes one wonder what the nature of such objects consists in, and how we attain knowledge of them. Platonism likens mathematical objects to physical objects and properties that are not constructed by humans: the claim, more precisely, is that there is no constitutive relation of dependence between the existence of mathematical objects and the cognitive activity of human beings. To raise an integration challenge in this connection, then, is to formulate a potential epistemological problem for Platonism, so understood, which although it oversimplifies will nevertheless suffice to illustrate the basic idea: (1) abstract objects are not spatially or temporally localized. (2) Mathematicians are. (∴) It is by no means clear how Platonism proposes to integrate its view of mathematical truth with an intelligible account of how we attain knowledge of it.

To come at this from the other direction, consider now a crude form of *conventionalism* that insists on constitutively reducing the facts in virtue of which mathematical propositions are true to those about whatever ‘working mathematicians’ take them to be and are disposed to apply in their practice.⁵¹ Certainly this is one way of avoiding the potential epistemological problem confronting rampant Platonism, but not so in a way in keeping with the demands of our problematic; for by lending credence to the idea that the standards governing mathematical judgements are constituted merely by the patterned or otherwise convergent attitudes and practice of working mathematicians, crude conventionalism effectively surrenders the datum that mathematical judgements take as their object a subject matter independent of us; in the sense that they involve truths about which we can be mistaken: in a word, it is by no means clear how crude conventionalism proposes to integrate its view of mathematical knowledge with a sufficiently robust account of mathematical truth.

The relevance of this example to the matter in hand is that it shows why we do not have to rely on any contentious philosophical doctrines in order to raise an integration challenge for a given domain or subject matter. Notice how our objections to rampant Platonism and crude conventionalism do not stem from any general views of the nature of truth and knowledge. The problem with rampant Platonism does not lie in its appeal to abstract objects *per se*; and as regards crude conventionalism we need have no truck with the very idea of truth by convention *in abstracto*. Both objections are rather motivated by the unexceptionable principle that we should work towards a

simultaneously acceptable metaphysics and epistemology of our subject matter: to the extent that we know some truths in the domain of mathematics and that there is, indeed, a well-conceived metaphysical issue about the constitution of the facts in virtue of which such propositions obtain, the thought is that we should not be ‘serving one or other of these masters *at the expense of the other*’;⁵² ‘The concept of truth, as it is explicated for any given subject matter, must fit into an overall account of knowledge in a way that makes it intelligible how we have the knowledge in that domain that we do have.’⁵³

8. The Case for Integration

The very idea of raising an integration challenge for a given subject matter is at its most interesting, not when it is considered in the abstract and general way articulated thus far, but rather when we reflect on how it applies in the context of specific domains. No two integration challenges are the same: different domains have their own distinctive features, and the characteristic challenges and difficulties involved in providing a simultaneously acceptable metaphysics and epistemology, for a given area, is necessarily sensitive to these features. It is essential to bear this last point in mind as we proceed; because I want to guard against the impression that the integration challenge for the legal domain is somehow driven by an overarching, one-size-fits-all, and domain-independent, methodological constraint that is superimposed in a ‘top-down fashion’, so to speak, on the legal domain that forms our concern—*I am not suggesting anything of the sort*. To be sure, my suggestion is that our challenge is helpfully viewed alongside the others that were discussed in the previous section, since that has the virtue of enabling me to make connections with related puzzles in a number of diverse areas of philosophical enquiry; yet my proposal is ultimately substantive and ‘bottom-up’ in character; for when it comes to appreciating what an integration challenge amounts to in any one specific domain, there are no shortcuts: we have to proceed by patiently reflecting on what it is exactly about our subject matter that presents us with the challenge of providing a simultaneously acceptable metaphysics and epistemology; why that challenge matters; what counts as acceptable or successful integration in the specific domain that interests us; and which theoretical options we should therefore be prepared to countenance at the outset of our inquiry. Such, then, is the work left over for the remainder of this essay.

It is important that we distinguish, in so doing, between two very different perspectives on the notion that there is an integration challenge confronting the legal domain. Until now, I have assumed in a somewhat cavalier fashion that there are indeed facts or true propositions about what the law requires in a given jurisdiction; such that there is the possibility of our attaining knowledge of what the law requires on a particular issue. Yet we can readily imagine a sceptic who will have no truck with such loose talk—her thought, more specifically, is that our starting assumptions are spurious and based on a misconception; she insists that there is not even in principle a coherent account to be had of either truth or knowledge in law: descriptive facts, she says, about what legislatures and courts have said and done never constitute determinate standards, so she concludes that our judgements of what the law requires in the instant case are arbitrary and essentially underdetermined. If our sceptic is right, the notion that there is an integration challenge confronting the legal domain is awry from the get-go: we cannot even begin to speak of integrating or reconciling truth and knowledge in law if these notions are as chimerical as the sceptic suggests.⁵⁴

Now, on what I shall call a *defensive* approach to our envisaged challenge, we proceed in the following way: we begin with the thought that although, as we have seen, a multitude of theoretical options are, in principle, available when it comes to raising an integration challenge for a given subject matter; since radical scepticism cannot feature among them, it follows that I must now say something at the very outset about how, if at all, the spectre of scepticism in law may be exorcized; for only in that way can we proceed confidently in the knowledge that there may be a genuine problem on our hands to the task of examining the particulars of the integration challenge for the legal domain. Proceeding thus is a defensive project, because instead of pressing forward with the first-order question of how we should explicate truth and knowledge in law—integrate or reconcile the two no less—we become detained by the second-order question of whether our proposed problematic may disappear once we take on-board sceptical or otherwise deflationary misgivings about the truth-aptness of our subject matter and/or the extent to which it is capable of furnishing us with an object of genuine knowledge.

One of the main reasons why I was so keen to discuss in more general terms the very idea of raising an integration challenge for a given subject matter ahead of my doing so in the legal case is that it helps to demonstrate why we should rather explore *constructive* accounts of truth and knowledge in law: how, armed with the most unexceptional background assumptions and starting premises, we can press forward with the first-order question of how they should be reconciled, rather than be detained

by second-order issues. Although this means gliding over an area of great philosophical difficulty, in which much important work has been done and in which there is still much to do,⁵⁵ our excuse should be that we are interested in issues that arise at a later stage—not *whether* there can be truth and knowledge in law but *what* they consist in and *how* they may be reconciled—eager, in other words, to confront the pressing theoretical problem that is the integration challenge for the legal domain at face value. Indeed, the costs of endorsing scepticism come at an extremely high price. At a stroke, it renders unintelligible a bewilderingly wide array of seemingly uncontroversial aspects of legal practice. Grant with one hand the premise that there is not even in principle a coherent account to be had of either truth or knowledge in law, and it seems that we have to take away with the other: a convincing explanation of the difference between a first and a third in law exams; a plausible story as to why we solicit the advice of specialists on whether, say, I can found a claim in private nuisance; and a coherent line on why we appoint judges, at least in part on the basis of their superior knowledge of the law, to sit on cases. The integration challenge for the legal domain, then, is not a needless abstraction. Far from it: as we shall see in due course, a constructive account of truth and knowledge in law is sorely needed, and I daresay where the action is.

Let me now try to formulate—in an intuitive and preliminary way, at this stage, as I have emphasized—a little more carefully the integration challenge I have in mind. It may be seen as stemming from three principles or assumptions, which I shall dub the *judgement-dependence*, *normativity*, and *learnability* of legal standards respectively.⁵⁶

First, if there are facts about what the law requires in a given jurisdiction, these are decidedly unlike facts such as the existence of any particular quark, which let us assume obtain independently of any individual or community having thought about or engaged with them.⁵⁷ This is because legal practice presents us with an area of intentional human activity where the beliefs, attitudes, and judgements of lawyers and judges do not merely track an independently constituted set of facts about the existence and content of legal standards, but are rather partly constitutive of these. Consider again our example from trusts law doctrine. That English law requires Jack to manifest and prove his declaration of trust in writing is a standard the existence and content of which cannot be considered independently of the thoughts, arguments, reasoning, and decisions that lawyers and judges have made about fact situations of this kind; on the contrary, it is precisely *because* lawyers and judges have and continue to think, argue, reason, and make decisions in the way that they do—in particular, the way they invariably regard certain acts or events such as the Law of Property Act 1925 as having

legal significance and, moreover, use them to guide and constrain their judgements of what the law requires in the instant case—that in part explains why this standard obtains in English law.⁵⁸ To say this much is assuredly not to take any specific view on precisely how and why it is exactly that the beliefs, attitudes, and judgements of lawyers and judges are partly constitutive of legal standards; it is merely to make the modest point *that* they are so constitutive, which as I say should be considered uncontroversial by all concerned. If this is right, there seems to be no antecedent motivation for drawing a bright line between the constitutive question and the problem of legal knowledge; to be sure there are helpful preliminary distinctions that we can draw between the two, but when we reflect on the constitutive relation of dependence between the existence and content of legal standards, on the one hand, and the cognitive activity of lawyers and judges, on the other, of comparatively greater interest it seems is their interdependence.

The second principle asserts that, whatever else legal standards are, they must in principle be able to serve as intelligible guides to human conduct. Consider the familiar example of a coordination problem.⁵⁹ It seems clear that considerations of safety and efficiency demand that people drive on a given side of the road; indeed, it seems plausible that subjects have reasons, independently and antecedently to any action taken by a legislature in this connection, to converge in driving on the right or left. Yet these reasons are incomplete. Either the right or left hand side of the road seems equally good for this purpose, and on the assumption that no general and sustained convention may have arisen in practice, a coordination problem emerges because although people have sufficient reason to drive on that side of the road that the vast majority are likely to drive on, nothing makes the right or left hand side of the road a salient option. Now suppose a legislature specifies that everyone should drive on the left hand side of the road. This action by the legislature may well have, and in jurisdictions such as the UK and Australia I daresay *has* had, the effect of making the specified solution more salient than others.⁶⁰ As a result, assuming that drivers have background reasons of safety and efficiency to follow the solution that most other drivers are likely to follow, every driver may now have an obligation to adopt the specified solution. In this way, the legal standard specifying that drivers should drive on the left hand side of the road serves as an intelligible guide to human conduct: it supplies a basis for evaluation or criticism by identifying what drivers are legally entitled, ought, or permitted to do in these circumstances as far as that jurisdiction is concerned, such that we adjust our behaviour accordingly.⁶¹

Reflect a moment on how any of this is possible. Suppose counterfactually that we were unable—in very many normal cases effortlessly, even thoughtlessly—to acquire true beliefs about what legal standards specifically require on an everyday basis (e.g. the date by which I should file my tax returns or whether I can smoke on the London Underground), or obtain reliable advice from specialists on more technical issues (such as whether I can sue in private nuisance notwithstanding my lack of a proprietary interest in the relevant land).⁶² That would not be to draw attention to an accidental, superfluous, or contingent aspect of what legal standards are and how they work; it would rather be to contravene our common experience of them as for the most part intelligible and reliable guides to human conduct which enable us, for instance, to make plans, to convey property or engage in other transactions, and settle cases out of court; *a fortiori* in the case of our earlier coordination problem, since the relevant salience and attendant solution of this problem precisely depends on there being no great mystery as to what the legislature requires drivers to do in respect of these circumstances.

The point of these examples is not to suggest that all legal standards respond to a coordination problem of some description,⁶³ nor is it to commit ourselves to any one specific view on what legal standards are, how they obtain in virtue of more basic descriptive facts, or the precise sense in which they supply a basis for evaluation or criticism. What the examples are concerned to do, rather, is offer an intuitive way, among others to be sure, of making the modest point that legal standards seemingly have the functional or normative property, so to speak,⁶⁴ of being in principle able to serve as intelligible guides to human conduct, which I submit is an uncontroversial starting point for the elaboration of more specific views on what legal standards are and how they work.

And yet to identify that functional or normative property is *ipso facto* to arrive at a significant epistemic constraint on metaphysical theses of what legal standards are. As the familiar example of a coordination problem illustrates, we should have no truck with views that render unintelligible or opaque the constitutive dependence of legal rights and duties on descriptive facts about what legislatures and courts have said and done. This is because were it not for our ability in very many normal cases to acquire true beliefs about the existence and content of our legal rights and duties and adjust our behaviour accordingly, it is by no means clear how legal standards could function as they are supposed to. Put another way, unless and until we are prepared to relinquish our common-sense assumptions that, whatever else legal standards are, they must in

principle be able to serve as intelligible guides to human conduct, we should expect or anticipate a simultaneously acceptable metaphysics and epistemology of legal standards; thus suggesting that the constitutive question and the problem of legal knowledge are two facets of a larger puzzle.

The third principle is that it is of no small significance for metaphysical theories of what legal standards are that the law is *learned*, since any such theory will be adequate only if it explains or is at least consistent with this fact.⁶⁵ The principal task confronting such theories, as we have seen, is to account for how it is exactly that legal rights and duties obtain in virtue of descriptive facts about what legislatures and courts have said and done. The problem of legal knowledge, however, reveals why we have good reason to levy learnability conditions on candidate answers to that constitutive question. If lawyers and judges have superior knowledge of what the law requires in a given jurisdiction, presumably this is on account of their having learnt the law by engaging in a distinctive education and training. The present point is that candidate answers to the constitutive question should explain or at least be consistent with this fact.

The rationale for imposing this constraint stems from the truth that any theory *T* of what legal standards are and how they obtain will *ipso facto* provide a specification of our knowledge of them. To put it another way, since *T* furnishes what one knows when one knows the law, to the extent that what one knows is learned, *T* should be learnable.

Consider again our example from trusts law doctrine. To tell some metaphysical story about what makes it the case that *p* obtains is to specify the *content* of our knowledge that Jack is legally required to manifest and prove his declaration of trust in writing. As a result, we cannot accept just any-old theory of what legal standards are and how they obtain, such that *if* lawyers and judges were to know *T* they would count as knowing what the law requires in the instant case; quite the opposite: we should rather expect a theory that meshes with and, moreover, ratifies their actual means or methods in ascertaining the content of the law in a given jurisdiction at a given time.

Suppose it were otherwise. We would then be committed, in principle, to a theory of what makes it the case that the law requires what it does that fails to establish the requisite links between the underlying metaphysics of legal standards, and the actual methods deployed by lawyers and judges in ascertaining the existence and content of these standards on a case by case basis; in short their epistemology. Such a theory would thereby overlook the *explanandum* that lawyers and judges have superior

knowledge of what the law requires in a given jurisdiction, because it would neither explain nor be consistent with the fact that they have learnt the law and acquired this knowledge on the basis of a distinctive education and training in deploying those methods.

To impose such a constraint is not to renege on the possibility of there being mistake or error about what the law requires in a given jurisdiction, and the obvious truth that developed legal systems contain so much law that no one could hope to learn all of it is neither here nor there. The moral to be drawn about learnability is that if some theory of how legal standards obtain generates implausible consequences regarding how these standards are known to obtain, and in particular what such knowledge consists in, then that should serve as a check on the plausibility of certain metaphysical theories of how it is exactly that legal rights and duties obtain in virtue of descriptive facts about what legislatures and courts have said and done; hence our third reason for drawing no bright line between the constitutive question and the problem of legal knowledge.

The integration challenge for the legal domain, then, arises for someone who is inclined to accept these three assumptions or principles; not because they are necessarily inconsistent with each other, but rather on account of how further reflection on them shows why our pre-theoretical conception of law is such that we should expect or anticipate a simultaneously acceptable metaphysics and epistemology of legal standards. The challenge, in a nutshell, is to provide a simultaneously acceptable answer to the constitutive question and the problem of legal knowledge: how, if at all, can we integrate a plausible account of what makes it the case that the law requires what it does with a credible account of what it is to know what the law requires on a particular issue? The challenge emerges quite naturally, I have suggested, once we consider: first, the constitutive relation of dependence between the existence and content of legal standards and the cognitive activity of lawyers and judges; secondly, how whatever else legal standards are they must in principle be able to serve as intelligible guides to human conduct; and thirdly, how any metaphysical theory of what legal standards are will be adequate only if it explains or is at least consistent with the fact that the law is learned. To be more specific, given what has been said thus far, it seems that three interrelated puzzles have to be met. I am not suggesting that these are the only important questions, but they are, at any rate, questions that any solution of the integration challenge for the legal domain should be able to answer; which is why I intend to focus on them at much greater length in the next two chapters. My goal in the previous sections has been the preliminary and modest one of explaining in an intuitive way why these questions merit

scrutiny in philosophical discussions of the nature of law. As a result, let me close here simply by listing the outstanding questions that I have in mind.

First, although it seems clear that the beliefs and attitudes of lawyers and judges are partly constitutive of those facts about the existence and content of the legal standards that obtain in a given jurisdiction, the very possibility of being mistaken about what the law requires necessitates there being some logical space between these judgements of what it requires and what it in fact requires. How, then, should we understand that space? Just how much scope for ignorance or error is there when it comes to the existence and content of the legal rights and duties that obtain in a given jurisdiction at a given time?

Secondly, if legal standards are to determine what the law requires on a particular issue; for instance, whether English law requires Jack to manifest and prove his declaration of trust in writing, there have to be facts about how the enactment of statutes and the adjudication of cases make it the case that the law has *this* rather than *that* content. So what is it exactly that constitutively explains the relevance of these descriptive practices in determining what the law requires on a particular issue and how do they determine its content?

Finally, assuming facts about the existence and content of legal standards are granted the proper independence seemingly demanded by our thought and talk about ‘getting the law wrong’, how can we simultaneously account for the fact that the law is learned, such that lawyers and judges have an ability to be appropriately sensitive to what these standards specifically require case by case? Indeed, what exactly does this superior knowledge of what the law requires consist in?

9. Objections and Clarifications

I have presented earlier drafts of this chapter at numerous seminars and workshops where, on the whole, I have met with two sorts of responses to the notion that there is an integration challenge confronting the legal domain.

The first reaction I have encountered is generous and positive. Here my interlocutor accepts that I may have succeeded in putting my finger on a new question for general jurisprudence. This question, to be sure, is grounded in a metaphysical issue that is already firmly on the agenda of legal philosophers. On the other hand, since my discussion does well to highlight a neglected epistemic issue in this connection, we

should now be undertaking in earnest the task of providing a simultaneously acceptable metaphysics and epistemology of legal standards.

I have, however, encountered a more negative type of reaction; as a result, and with a view to clarifying my thesis, it will be well for me to address that reaction here in the final section of this chapter.

The particular objection I have in mind is as follows.⁶⁶ ‘My statement of the integration challenge for the legal domain is trivial and bordering on the banal. Presumably, any area of intentional discourse worth having demands a simultaneously acceptable metaphysics and epistemology of its subject matter, so law should be no different. Certainly, I may deserve some credit for bringing this global problem to the attention of legal philosophers, but little turns on this for the practice of general jurisprudence. On the contrary, it is by no means clear how one might even *begin* to reject the idea that we have to reconcile a plausible answer to the constitutive question with a credible answer to the problem of legal knowledge. What, if anything, is telling or informative about that claim? In short, the present chapter amounts to little more than embroidery on my part. All I have done is lifted a global philosophical problem and plugged it into law. In and of itself, the challenge is empty and should be ignored.’

Here my interlocutor makes numerous mistakes. First, the integration challenge for the legal domain is far from trivial. Recall my distinction between constructive and defensive approaches to this pressing theoretical problem. Although I have motivated my intention to focus on approaches of the former variety, I did not, in so doing, rule out the necessity and importance of defensive approaches to the integration challenge for the legal domain. Quite the opposite. A radically sceptical position on truth and knowledge in law entails, as I have said, that the integration challenge for the legal domain is awry *ab initio*. If there are no facts of the matter about what the law requires in a given jurisdiction, then there is no constitutive question to address; still less is there a challenge of reconciling plausible answers to it with credible answers to the problem of legal knowledge. So, endorsing radical scepticism is one clear, albeit far from straightforward, way of rejecting the notion that there is an integration challenge confronting the legal domain. Nothing I have said thus far, or shall go on to say in the remainder of this essay, rules out such a position, or denigrates the important philosophical work that remains to be done on these second-order issues. To reiterate, I have offered my reasons for wishing to bypass these discussions and thereby confront our challenge at face value. In any case, the fact that this controversy about scepticism

remains open indicates that the integration challenge for the legal domain is far from trivial.

Secondly, my interlocutor misunderstands my purpose in discussing, in more general terms, the very idea of raising an integration challenge for a given subject matter with reference to the domains of modality, the intentional contents of our own mental states, and statements about the past. There may very well be a global integration challenge, in particular the kind discussed by Peacocke, that arises for any area of our thought and talk about the world. At any rate, I have no stake in that debate. To see this, recall how my argument proceeded in support of the claim that there is an integration challenge confronting the legal domain. Notice how I did not start by saying, ‘Look, there is a certain kind of challenge that we raise all the time in philosophy across many different areas, so let’s see how, if at all, it applies to law.’ Instead, starting from first principles, I patiently tried to show why our pre-theoretical conception of law is such that we should expect or anticipate a simultaneously acceptable metaphysics and epistemology of legal standards. Only *then* did I proceed to make illustrative comparisons with integration challenges in other areas; and this I did for only the limited purpose of teasing out the minimal premises about the nature of truth and knowledge that underlie our problematic, globally speaking. Hence, in the final analysis, my discussion of the integration challenge outside the law is scaffolding, such that our problematic could be easily stated without it. This is why it is wrong to say that I have merely lifted a global philosophical problem and plugged it into law.

So far so good, one suspects, but my interlocutor is not finished. He continues thus. ‘Granted the integration challenge for the legal domain is not trivial, after all, and does not depend on there being a global integration challenge that arises for any area of our thought and talk about the world. But what exactly *is* the challenge? We have to provide a simultaneously acceptable answer to the constitutive question and the problem of legal knowledge. True enough. But what *counts*, then, as acceptable or successful integration in this area? What might an adequate response to our integration challenge look like? What, if any, constraints, desiderata, or adequacy conditions should we seek to impose on candidate responses to this pressing theoretical problem? Surely, until these are specified, for all that I have said thus far, the challenge remains banal and uninformative.’

Here my interlocutor is not so much wrong as impatient. As I said in Chapter I, these are questions for the next two chapters. There my aim is to offer a discrete and elaborated conception of how the metaphysics and epistemology of legal standards

should stand together, and thereby furnish the content of the integration challenge for the legal domain. I shall be arguing, in particular, that adequate solutions to our challenge must proceed on the basis of some simple but generally overlooked ideas. Anyhow, the reader will judge those ideas by their fruit.

Notes to Chapter II

- 1 My example draws on McKendrick (2012: 255); Treitel (2007: 655-8). See also Burge (2007: 109-10).
- 2 I owe this example to Swadling (2007: 220). For helpful discussion, see Ackerman (1977: 26); Gray and Gray (2007: 27-57).
- 3 I am aware, of course, that there exists in criminal law a ‘common assault’ that yokes together the elements of assault and battery notwithstanding my attempt to distinguish them in the text, on which see *R v Lynsey* [1995] 3 All ER 654; *R v Ireland* [1998] AC 147; the Criminal Justice Act 1988, s 40; the Offences Against the Person Act 1861, s 47. The point stands for the purposes of the law of torts, however.
- 4 See respectively *Partridge v Crittenden* [1968] 1 WLR 1204; *DPP v K* [1990] 1 WLR 1067; *Roberts v JW Ward & Son* [1981] 126 SJ 120.
- 5 For helpful discussion of this point, see Penner (2010); (2000).
- 6 The most prominent doubter is, of course, Timothy Williamson. See his (2000). See too Hossack (2007).
- 7 See Mitchell (2010: 59); Penner (2012: 15).
- 8 *Choithram (T) International SA v Pagarani* [2001] 1 WLR 1, 11. See further JE Martin (2012: 123-4, 136).
- 9 See generally Atiyah and Summers (1987: 53-6). See also Bell (2007: 3-45).
- 10 Thus, as Joseph Raz (1994: 221) puts it: ‘To establish the content of the statute, all one need do is to establish that the enactment took place, and what it says. To do this one needs little more than knowledge of English (including technical legal English), and of the events which took place in Parliament on a few occasions.’
- 11 Which replaced s 7 of the Statute of Frauds 1677.
- 12 For the sake of completeness, our example assumes: (1) that no constructive or resulting trusts arise by operation of law, on which see respectively *Hodgson v Marks* [1971] Ch 893; *Scheuerman v Scheuerman* [1916] 28 DLR 223; (2) that the doctrine enunciated in *Rochefoucauld v Boustead* [1897] 1 Ch 196 does not apply, on which see also *Bannister v Bannister* [1948] 2 All ER 133; (3) that Jack has not sought to provide writing after the fact of his oral declaration with a view to satisfying s 53(1)(b), on which see in particular *Gardner v Rowe* [1828] 5 Russ 258. For further discussion of these points, see Chambers (1997: 25, 34); Swadling (2010); Youdan (1984).
- 13 I borrow this term from Wright (2008). The best description of this fundamental problem is, of course, to be found in Kripke (1982). In the legal case, my presentation of the constitutive question draws on Greenberg (2004); Raz (2009: 3, 134-5); Stavropoulos (2012).

- 14 See also *Smith v Matthews* [1861] 3 De G. F. & J. 139; *Morton v Tewart* [1842] 2 Y. & C.Ch. Case 67.
- 15 I couldn't resist appropriating Wittgenstein's phrase here. See his (1967: §139, original emphasis). See further Hershovitz (2002: 22-3).
- 16 Pavlakos (2007: 15). For helpful discussion, see Stavropoulos (2004); Nozick (1981: 167-71). See also Nozick (2001: 75-9); Raz (1999: 118-32). Compare Raz (2009: 62-76).
- 17 For a representative sample of the literature that, in one way or another, has sought to address the constitutive question, see Coleman (2007); Enoch (2011); Marmor (2011); Plunkett (2012); Shapiro (2011). This way of approaching the issue is, of course, largely owing to the work of Mark Greenberg and Nicos Stavropoulos, and my presentation in this section draws on their important contributions. See Greenberg (2011), (2004); Stavropoulos (2013).
- 18 I have borrowed both of these terms from Nicos Stavropoulos: the first from his (2012: 76); the second from his (2007: 33). At the risk of redundancy, consider the following quotations, which are offered by way of corroboration of my claim that the two theories under consideration are held in the esteem suggested in the text: 'Along with Dworkin, Raz is the true giant of our field.': Coleman (2007a: 13); 'the leading doctrines in legal philosophy today': Stavropoulos (2007: 35).
- 19 See especially Raz (1994a).
- 20 See in particular Dworkin (1977); (1988).
- 21 See Raz (1994: 224); Green (2012: xviii); Leiter (2007).
- 22 See especially Stavropoulos (2004); (2001).
- 23 See Gardner (2012: 270-4). See too Greenberg (2014: 1295-1306).
- 24 See Dworkin (2006: 198-211); Stavropoulos (2012). See also Marmor (2013).
- 25 Schauer (2009: xi). For helpful surveys, see Lucy (2002); Penner (2002); Schauer (2012). See also Atiyah and Summers (1987).
- 26 Shapiro (2011: 9, 232-3, emphasis added). I have argued elsewhere that the implication question is especially unhelpful when it comes to understanding Ronald Dworkin's work in particular. See Lopez-Lorenzo (2012). I have no need to repeat those arguments here, however.
- 27 Greenberg (2014: 1325 ff.).
- 28 See, for instance, Holland and Webb (2013).

- 29 For helpful discussion see Williams (1985).
- 30 Important contributions that have sought to address the topic of objectivity in law are Dworkin (1996); Brink (2001); Greenawalt (1992); Coleman and Leiter (1995); MS Moore (1985); Putnam (1995); Stavropoulos (1996).
- 31 See for instance Alexander (1989); MacCormick (1994).
- 32 See especially Ryle (2000: 26-59).
- 33 I should point out that James Penner has taken some preliminary steps towards developing a conception of legal analysis as a kind of knowledge-how, although he would be the first to acknowledge that much more needs to be said here. See Penner and Melissaris (2012: 139-40); Penner (2010: 665 ff.).
- 34 See Shapiro (2011: 28 ff.).
- 35 In particular, how the moral impact theory of law proposes to handle the decision and reasoning in *Smith v United States* 508 US 223 (1993). See Greenberg (2014: 1291-95).
- 36 See Lewis (1973: 84-95); (1986).
- 37 For helpful discussion, see Forbes (1985: 75-6); Rosen (1990: 340); Lewis (1986: 108-15).
- 38 I am here following the convention of using small capitals to refer to concepts (e.g. CONTRACT), and quotation marks to indicate a word in natural language that expresses the concept (e.g. 'contract'). See Laurence and Margolis (1999: 4, at note 1).
- 39 See Putnam (1975); Burge (2007: 104-6).
- 40 Burge (2007: 104-6).
- 41 See Wright, Smith, and Macdonald (1998: 7-10); Boghossian (1998); McKinsey (1991).
- 42 A prominent contribution here is Burge (1988).
- 43 The discussion of this paragraph draws on Dummett (2004).
- 44 See generally Seton-Watson (1967: 134).
- 45 See further McDowell (1978: 131); Peacocke (1999: 5-6, 56-118); Wright (1993a).
- 46 Peacocke (1999: 1, original emphasis). For similar approaches, see Benacerraff (1973); Strawson (1959: 9); Wright (2008: 123-4).
- 47 For a representative survey, see the essays in Lynch (2001).
- 48 See Kornblith (2004).

- 49 I am much indebted here to Benaceraff (1973).
- 50 The term is John McDowell's (1994: 88). For a decidedly more sophisticated discussion of this broad approach to central questions of the philosophy of mathematics, see Wright (1983).
- 51 I owe this point to Kripke (1982).
- 52 Benaceraff (1973: 661, original emphasis).
- 53 Peacocke (1999: 1-2).
- 54 Views of this kind often bear the imprint of Ludwig Wittgenstein's remarks on rule-following in his (1967). For a representative sample, see Yablon (1987); Radin (1992); Tushnet (1982). For what it's worth, I do not believe that Wittgenstein's remarks support either general scepticism about rules or the conclusion that legal standards are radically indeterminate. Helpful discussion of this point can be found in Hershovitz (2002).
- 55 See the important contributions that have sought to address the topic of objectivity in law at (note 30) above.
- 56 I have taken much instruction in presenting my ideas this way from Davidson (1980: 208-9).
- 57 I owe this example to Shapiro (2011: 26).
- 58 Perhaps unsurprisingly, scholars concerned with the historical development of the common law have been ardent to press this point in philosophical discussions and, often, highly effective in doing so. For illuminating discussion, see Postema (1986); Simpson (1987).
- 59 On the concept of a coordination problem, see Lewis (1969); Ullmann-Margalit (1977); Schelling (1963).
- 60 See generally Geoghegan (2009).
- 61 This point is developed especially well in Shapiro (2011: 40-2).
- 62 See *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL).
- 63 I do not share that view. I think it is doomed to failure, and have been persuaded to this effect by the arguments developed by Leslie Green in his (1988: 89-121).
- 64 Philosophers use these terms in different ways. I mean to use them as Mark Greenberg does in articulating what he calls his 'bindingness hypothesis' that there is 'something defective about a legal system to the extent that it creates legal obligations that it is all-things-considered permissible to violate'; although my hypothesis that legal standards

have the functional or normative property of being in principle able to serve as intelligible guides to human conduct is much weaker and considerably less interesting than Greenberg's. See Greenberg (2011: 81). To attribute a functional or normative property, then, to a given object or kind F is to claim that F is supposed to have a certain property, or is defective to the extent that it does not. Thus, when someone S says that instances of F 's are supposed to G (e.g. that beliefs have truth as their constitutive aim, or that hearts are supposed to pump blood), when they work properly, S purports to say not merely something true, or necessarily true, about F ; but something about F 's nature.

- 65 Compare Davidson (1984a). I have also taken much instruction from Matthews (1986).
- 66 I am indebted to John Tasioulas and Scott Shapiro for impressing on me the importance of considering this point in greater detail.

III

Two Constraints on the Constitutive Question

10. Legal Dispositionalism and the Linking Thesis

The previous chapter sought to introduce the *integration challenge* for the legal domain and demonstrate why that challenge merits scrutiny in philosophical discussions of the nature of law. This task I began by presenting the *explanandum* that lawyers and judges have superior knowledge of what the law requires in a given jurisdiction, and I then went on to show how that platitude inevitably raises the problem of what such knowledge consists in exactly. It is not hard to discern the general motivation for addressing that *problem of legal knowledge*, I suggested, seeing that the controversies of how we should decide to appoint judges, the legitimacy of their decision-making, and the proper aims and methods of legal education, in particular, are just some of the pressing issues that call on us to examine what one knows when one knows the law. The crux of my thesis, however, was the more ambitious claim that this epistemic puzzle also has a significant bearing on the metaphysical or *constitutive question* of what makes it the case that the law requires what it does, and thereby occupies a pivotal position in the general theory of what law is and how it works.

The *datum* that lawyers and judges can be mistaken about the existence and content of legal requirements entails, as we have seen, that the constitutive question and the problem of legal knowledge cannot be considered identical. Yet we have further seen why it does not follow that we best approach the metaphysics and epistemology of legal standards in two discrete steps. On closer inspection it emerged, more specifically, that the current tendency of assigning primacy to the constitutive question and thereby treating the problem of legal knowledge as its poorer cousin has precious little to commend it. There can be no doubt, in the first place, that the epistemological issues generated by the problem of legal knowledge cannot be so easily gerrymandered into discussions of the nature of *legal reasoning*, or the *implication question* of how we should square metaphysical theses about the nature of legal standards with a credible view of the practice of interpreting legal texts. In the second place, on the assumption that the superior knowledge of lawyers and judges is somehow to be explained in terms

of a systematic link that obtains between their actual methods of forming judgements about what the law requires and what it in fact requires, it follows that if we continue along the lines suggested by the *case for primacy* it is by no means clear how we could ever account for the *explanandum* with which we began.

By contrast, I have urged the importance and potential fruit of adopting an integrated perspective on our two main questions. My view is that the constitutive question and the problem of legal knowledge are best regarded as two facets of a larger puzzle: that our pre-theoretical conception of law is such that we should expect or anticipate a simultaneously acceptable metaphysics and epistemology of legal standards: that general jurists simply must attend to the task of providing a simultaneously acceptable answer to both of these questions. The challenge emerges quite naturally, I have suggested, once we reflect on three innocuous principles or assumptions about the judgement-dependence and learnability of legal standards, and the capacity those standards have to function as intelligible guides to human conduct. Furthermore, our discussion in more general terms of the very idea of raising an integration challenge for a given subject matter shows why we need only rely on the most unexceptional background assumptions or starting premises in raising the integration challenge for the legal domain. If this is right, the time has come for us to abandon the approach of first and foremost trying to get our constitutive explanations of legal standards just right and only then proceeding to consider the ramifications of these accounts for the nature of legal knowledge. Instead, we should attack in earnest the question of how, if at all, we can reconcile a plausible account of what makes it the case that the law requires what it does with a credible account of what it is to know what the law requires on a particular issue.

It is important not to overstate, however, the positive case I have made hitherto for the proposition that there is an integration challenge confronting the legal domain. One should not be misled, in particular, into thinking that a full appreciation of our challenge may be had by studying the arguments of the previous chapter. On the contrary, to reiterate, the discussion thus far has been preliminary and intuitive. It is one thing, more specifically, to make the abstract and general claim that the metaphysics and epistemology of legal standards must *somehow* stand in a harmonious relation: that this question of their relation can and should be raised without presupposing any one favoured theory of what law is exactly, since it is already latent in our pre-theoretical understanding of what law is and how it works. It is quite another thing, however, to develop a discrete and elaborated conception of how the metaphysics and epistemology

of legal standards *should* stand together, and in particular to arrive at some understanding of the constraints, desiderata, or adequacy conditions that determine the right type of solution to our challenge. To make the former claim, as I tried to do in the previous chapter, is to specify the *form* of the integration challenge for the legal domain. To undertake the latter task, which is what I propose to do in the present chapter and the next, is to give our challenge its *content*.

The task ahead of us, more specifically, is to specify how we should try to proceed when it comes to providing a simultaneously acceptable metaphysics and epistemology of legal standards. What we stand in need of, in other words, is a *programme* that guides and constrains any adequate approach to the integration challenge for the legal domain. Lacking just such a programme, our challenge is rendered excessively abstract and bordering on the banal. Absent just such a concrete set of desiderata or adequacy conditions, we shall further lack the criteria necessary to test, in Chapter V, how our two leading theories of the nature of law fare with respect to our challenge, and therefore remain in the dark as to how we should try to do better.

In order to meet this need, then, the present chapter and its sequel propound a thesis that links the constitutive question with the problem of legal knowledge. I shall refer to this hereinafter as the *linking thesis*,¹ and the thesis I have in mind has two crucial components. The first component (1) is that we should expect or anticipate the dispositions of lawyers and judges to regard certain acts or events such as the enactment of statutes and the adjudication of cases as having legal significance—in particular, the way they invariably use them to guide and constrain their judgements of what the law requires in the instant case—to feature heavily in any plausible answer to the constitutive question. The second component (2) is that we should expect those dispositions to be equally prominent in any credible answer to the problem of legal knowledge. But therein lies the difficulty. Components (1) and (2) pull us in opposite directions. On the one hand, in this chapter, I shall argue that the aforementioned dispositions of lawyers and judges can only be *partly* constitutive of legal standards. On the other hand, as we shall see in the next chapter, I think those dispositions are *wholly* constitutive of what it is to know what the law requires in the instant case. But how can that be? How can those dispositions at once be wholly constitutive of legal knowledge but only partly constitutive of legal standards? The upshot, in short, is that there is a circle to be squared. Doing just that requires us to embark on what I call the *programme of legal dispositionalism*, which to my mind guides and constrains any adequate approach to the integration challenge for the legal domain. In what follows, I shall do

my utmost to bring that programme into bolder relief. My guiding aim, in particular, is to show how, why, and in what way the programme of legal dispositionalism furnishes three constraints—the *objectivity*, *relevance*, and *epistemological* conditions, as I call them—that determine the right type of solution to our challenge. To be clear, the objectivity and relevance conditions specifically constrain any candidate answer to the constitutive question, and so they will be my focus in the remainder of this chapter. The epistemological condition, by contrast, constrains any candidate answer to the problem of legal knowledge, which is what I shall focus on in the next chapter.

11. Dispositions: The General Concept

A glass has the tendency to shatter when struck, sugar has the proclivity to dissolve in water, and dynamite has the potential to explode. These abilities, potencies, and capacities are paradigmatic examples of what philosophers call *dispositions*.² I have already said that certain of the dispositions of lawyers and judges hold the key to the linking thesis. As a result, it will be well for us to begin by examining the general concept.

Fragility, solubility, and explosiveness are possessed by objects, kinds, or substances. When I say, for instance, that this particular tumbler is ‘easily broken’, I attribute or ascribe a very peculiar quality or characteristic to this glass; one which differs markedly from its size and shape. My ascription concerns what that glass is liable to *do*, say, if you drop it on the floor. But is that a genuine property? And, if so, how should we understand it? On the one hand, it seems innocent enough to hold that this tendency to shatter when struck is something that glass tumblers have in common. On the other hand, there are significant reasons to be puzzled by the way we often classify objects, kinds, or substances in terms of what they have the potential to do.

Nelson Goodman puts it nicely when he says that there is something altogether ‘ethereal’ about dispositions.³ In large part, this is because an object may retain its dispositional properties without ever manifesting them. Consider our tumbler again. Let us distinguish at once between its *categorical* and *dispositional* properties.⁴ That the glass is *round* is an instance of the former: a property that it has in all possible worlds. The matter is otherwise, however, with its dispositional properties. It may turn out, more specifically, that our glass is never struck or dropped on the floor. And yet we are confident in holding that if the glass *were* to do any of these things, then it would shatter into pieces. Now how can that be? Nothing in the overt behaviour of our tumbler makes

it necessary that it is liable to shatter when struck. So what, if anything, grounds our ascriptions of this ‘ghostly’ or ‘occult’ property to the glass that may never manifest itself?

Many people, including myself, believe that dispositions are ripe for a counterfactual analysis of some description.⁵ Here is the most straightforward version of this view. ‘An object is disposed to ϕ in circumstances C if, and only if, it *would* ϕ in circumstances C .’⁶ Continuing with our earlier example, then, the proposal, in a nutshell, is that a glass is disposed to shatter when struck if, and only if, it *would* shatter when struck.

This proposal has much to commend it: in the first place, given that nowadays the semantics of counterfactual conditional operators is well understood,⁷ by availing ourselves of this formal apparatus we can forgo positing any ghostly properties of objects in order to make sense of our dispositional ascriptions; in the second place, the analysis promises both to track and give an account of the modal concepts that are, no doubt, at the heart of our thought and talk about dispositions.

The problem is that some dispositions are notoriously *finkish*, by which I mean those dispositions that disappear whenever they would otherwise be manifested.⁸ The following example is due to Daniel Nolan.⁹

Suppose Mary is a very angry person, and has the disposition to get angry and violent at very little provocation. Because of this, Jane follows Mary around with a tranquilizer. Whenever Mary is put in situations of stress, Jane immediately tranquilizes her, which makes her very calm and sleepy. So while Mary has a very angry disposition, it is *not* true that were she to be stressed, she would get angry. So it looks as though Mary can have the disposition without the corresponding counterfactual being true.

Let us forgo any further discussion of how we might remedy the straightforward counterfactual analysis in order to handle the problem of finkish dispositions. My goal in this section is merely to introduce the general concept of dispositions, not contribute something to the impressive literature concerning what these are exactly.

Of comparatively greater interest, for present purposes, then, is that dispositions are just as central to our understanding of *people* as they are of objects, kinds, and substances. Take the qualities of courage and bravery. You have these qualities in abundance, let us assume, whereas I lack them. Why the difference? What is it exactly

that distinguishes brave and courageous people like you from cowardly individuals like me? The most natural answer, I suggest, is that you are disposed to have certain reactions to danger, whereas I do not. Suppose there is a gunman in the bank. You are disposed to confront him, let us assume, whereas I am disposed to take cover. The point is not that *because* you are courageous and brave you are disposed to have that reaction to the gunman. The point, rather, is that *what it is* for you to be courageous and brave is to have just those dispositions in just those circumstances. So we can all agree that dispositions are just as much part of our picture of *actions* as they are part of our picture of *thoughts*.

12. Dispositions, Standards, Meaning, and Content

The next thing we have to discuss in general terms is what it is to give a dispositional account of a given subject matter. To be more specific, having introduced the general concept of dispositions, here I proceed to examine the structure of dispositional theories of meaning and content, and then outline the characteristic difficulties confronting such theories.

The most influential discussion in this area is Saul Kripke's, *Wittgenstein on Rules and Private Language*.¹⁰ There is a lot going on in this book that has no bearing on the present section of this essay. I shall, in particular, ignore all questions of Wittgenstein exegesis, and let me be clear that the 'private language' argument is not my concern at the moment.¹¹ Instead, I want to extract from Kripke's discussion a dispositional theory of meaning and content of a certain not-very-special sort, before then assessing his claim that just such a theory suffers from two fatal difficulties.

In Kripke's book, a sceptic argues for a sceptical paradox. The paradox is that there is no fact of the matter that determines the meanings of our linguistic expressions: nothing in virtue of which our mental states have the semantic contents that they do. Notice that this is a *metaphysical* question about what grounds what, not an *epistemic* puzzle about how we find out about it.¹² The puzzle Kripke wants to impress on us, in particular, is how descriptive facts about our usage of this or that linguistic expression or mental symbol constitutes a *standard* to use it in one way or another. The parallels between this puzzle and the constitutive question, then, are patent. Hence the utility of our considering the former at this stage.

To make us feel the force of this paradox, Kripke takes it up in connection with a mathematical example. I shall follow him in this. It bears emphasizing, however, that

similar considerations apply to all meaningful uses of language, and to any mental state that has a particular content.

Imagine, then, that you have never before performed the sum of $68+57$. You answer 125, and the sceptic queries the correctness of this answer. ‘What fact in the past makes it the case’, he asks, ‘that you mean the *addition* function by your use of the “+” sign?’ ‘In virtue of what’, continues the sceptic, ‘can we rule out the hypothesis that by your use of the “+” sign you meant the *quaddition* function; thus giving us the answer of 5?’ As the sceptic points out, it will not do to cite facts about our previous *behaviour* in using the ‘+’ sign. This is because we are, by hypothesis, dealing with numbers larger than we have ever dealt with before; with the upshot being that nothing from our finite stock of previous behaviour will suffice in explaining why we are justified in answering 125 to $68+57$.

The sceptic’s mathematics, no doubt, strikes you as obviously wrong. Is that so? If so, why is that so? How, in particular, should we set about salvaging the thought that there are indeed facts of the matter that both determine the meanings of our linguistic expressions and individuate the semantic contents of our mental states?

At this juncture, Kripke moots the possibility of there being a dispositional solution of the sceptical paradox. As Paul Boghossian notes, the significance of Kripke’s discussion here is extremely wide-ranging;¹³ which is largely owing to the fact that many influential contemporary accounts of content-determination are, for all of their differences, at bottom forms of the dispositional account discussed by Kripke.¹⁴

Such a theory may be elaborated along the following lines. We begin with the thought that speakers of a language L have settled dispositions to use linguistic expressions in L in one way or another. Continuing with our mathematical example, then, the basic proposal is that *what it is* for someone to mean *addition* by their use of the ‘+’ sign is for them to be disposed, say, to answer 125 when presented with the sum of $68+57$. As we have already observed, modal concepts are at the heart of our thought and talk about dispositions. In consequence, when we judge that I am disposed to answer 125 in response to our sum, we do not report a fact about my actual or observable behaviour. What we do, instead, is report a rather more complex dispositional fact about what I *would do* or *would have* done in a given set of circumstances. As a result, it is no objection to the present proposal that we are dealing with numbers larger than we have ever dealt with before.

It seems, however, that dispositional theories of meaning and content suffer from two fatal difficulties. I am not suggesting that these are the only important

shortcomings, but they are, at any rate, shortcomings that strike one especially prominently. Let us refer to Kripke's arguments in this connection, then, as the argument from *finitude* and the argument from *normativity* respectively.

To begin with the argument from finitude, the totality of dispositional facts about how I would, or would have, responded to our sum is, to be sure, more complex than that of my actual and observable behaviour. None the less, both totalities are inherently finite. We can readily conceive two numerals so long that I should surely die before being able to determine their sum. Hence it is straightforwardly false to hold that I am *always* disposed to give the sum of two numbers when presented with, 'What is $x+y$ '? The upshot is that we can easily construct a further deviant hypothesis. 'In virtue of what', the sceptic asks, 'can we rule out the supposition that by your use of the "+" sign you meant the *skaddition* function; thus giving us the answer of 5?' The hypothesis is now perfectly compatible with the totality of dispositional facts about how I would, or would have, responded to our sum. As a result, it seems that dispositions cannot feature alone in a constitutive explanation of meaning and content, because in and of themselves they fix neither the meanings of our linguistic expressions nor the contents of our mental states.

Turning now to the argument from normativity, my disposition to answer 125 in response to our sum is a *descriptive* and *contingent* fact about me. It therefore differs in kind from any *normative* fact that determines what I ought to do. Surely, the facts in virtue of which linguistic expressions have meaning and mental states have content are normative rather than descriptive. Suppose it were otherwise. We should then be unable to leave any room for the possibility that I may err in my arithmetical operations or, more generally speaking, make a mistake in my use of linguistic expressions and in my acquisition of beliefs about some object. None of this is explained, however, on the dispositional account. Because this account holds that *what it is* for someone to mean addition by their use of the '+' sign is for them to be disposed, say, to answer 125 when presented with the sum of $68+57$, it effectively surrenders the notion of there being a *standard* that governs how I *should* or *ought* to respond to our sum, independently and antecedently of my having any settled dispositions to do so.

To be sure, the arguments from finitude and normativity are closely related. Indeed, following Akeel Bilgrami,¹⁵ we can express the fundamental point to be taken from both arguments in terms of G.E. Moore's 'open-question' argument.¹⁶ On the one hand, it seems plausible that dispositions may very well have *some* role to play in constitutive explanations of why our linguistic expressions and mental states have the

meanings and semantic contents that they do. On the other hand, it is always a *non-trivial* or *open question* how, why, and in what way our having those dispositions constitutes a standard to use our linguistic expressions or mental symbols in one way or another. The bottom line is that we have to appeal to something *other* than those dispositions in constitutive explanations of meaning and content. Only in *that* way shall we be able to explain what gives those dispositions their relevance and, moreover, leave sufficient room for the possibility of there being mistake or error about a given subject matter.

The debate continues, of course, regarding the significance of Kripke's exposition, and in particular whether dispositional theories of meaning and content have the resources necessary to respond to his arguments from finitude and normativity.¹⁷ (I shall return to some of these issues in later sections.) Here I have briefly reviewed the reasons for thinking that those criticisms stand, but not much turns on this. For present purposes, the crux of the matter is what we hope to *elicit* from this general discussion of dispositions, standards, meaning, and content; in particular, how it assists in our formulation of the programme of legal dispositionalism that constrains any adequate solution of the integration challenge for the legal domain.

13. Type-1 Dispositions and Counterfactuals in Law

So far I have been discussing dispositions in general terms. I began, more specifically, by introducing the general concept of dispositions, before then proceeding to examine the structure and characteristic difficulties confronting dispositional theories of meaning and content.

The upshot is that the reader may very well be wondering what any of this has to do with law. Well, the answer lies in this. The present chapter is concerned with the first component of the linking thesis. I therefore have to explain why candidate answers to the constitutive question must begin by appealing to the dispositions of lawyers and judges in a given jurisdiction. To be more precise, it is incumbent on me to show how, why, and in what way we should expect those dispositions to feature in any plausible model of how it is exactly that descriptive facts about what legislatures and courts have said and done constitute the legal standards that they do. As we shall presently see, our more general discussion of dispositions affords us much guidance in undertaking precisely this task. So, to state the question in earnest: why should we expect the dispositions of lawyers and judges in a given jurisdiction to feature heavily in any

plausible answer to the constitutive question? What reasons have we to anticipate a dispositionalist solution to that metaphysical issue?

In the first place, let me designate, more precisely, the types of dispositions I have in mind. I shall refer to these in this essay as *type-1* and *type-2* dispositions, which speak respectively to the constitutive question, on the one hand, and the problem of legal knowledge, on the other. Thus, to be clear, in this chapter I shall focus exclusively on the former kind of dispositions. Not until the next chapter shall I take up the latter.

To begin with type-1 dispositions, then, what I have in mind here is the way lawyers and judges invariably regard certain acts or events, such as the enactment of statutes and the adjudication of cases, as having *legal significance*, by which I mean the way they invariably use them to guide and constrain their judgements of what the law requires in matters that come before them in their official capacity.

Consider, by way of illustration, our earlier example from trusts law doctrine. Does English law require Jack to manifest and prove his declaration of trust in writing? Lawyers and judges do not ‘strike out on their own’ when they address such issues. On the contrary, as we observed in the previous chapter, it is a platitude that lawyers and judges regard certain instances of political history, such as the enactment of the Law of Property Act 1925, as *sources of law*. At root, this entails that lawyers and judges cannot simply advise their clients or adjudicate matters that come before them in their official capacity on the basis of whatever they personally think is right. Far from it: this requires lawyers and judges *in some sense* to give effect to or be consistent with sources of law, and thereby constrain their judgements of what the law requires in the instant case.

I place emphasis on ‘in some sense’ because locating precisely what is involved in regarding some instance of political history as a source of law is a matter of some controversy. Does that, for instance, require lawyers and judges to regard enacted statutes and decided cases as the edicts of some practical authority? Or does it require them, by contrast, to judge consistently with the scheme of principle underlying such decisions? Let us not get ahead of ourselves, however. These are questions concerning the perspectives suggested by certain *theories* of law. I do not want to address them here. Dialectically speaking, in this chapter, my aim is to carve out certain *constraints* on the constitutive question that to my mind stand *apart* from, and indeed should be regarded as *prior* to, any pet theory about what law is and how it works. Later on, to be sure, we shall be able to test how such theories negotiate these constraints, but first we need to motivate them in their own right.

I foresee no objection, then, to the notion that lawyers and judges have these type-1 dispositions. Again, modal concepts are crucial here. To say that lawyers and judges have type-1 dispositions to constrain their judgements of legal standards in accordance with certain sources of law is not merely to report facts about their actual or observable behaviour. It is, in contradistinction, to report a rather more complex set of dispositional facts about how they *would* judge or *would have* judged in advising their clients or adjudicating matters that come before them in their official capacity.

So, of comparatively greater interest, for present purposes, is how type-1 dispositions speak to the constitutive question. Why, in particular, should we expect those dispositions to feature heavily in any plausible answer to that metaphysical issue about what makes it the case that the law requires what it does? How, why, and in what way should we expect them to feature in any plausible model of how it is exactly that descriptive facts about what legislatures and courts have said and done constitute the legal standards that they do?

In the previous chapter, the first principle that I invoked in suggesting that our pre-theoretical conception of law is such that we should expect or anticipate a simultaneously acceptable metaphysics and epistemology of legal standards is that those standards are, significantly, *judgement-dependent*. This is because legal practice presents us with an area of intentional human activity where the beliefs, attitudes, and judgements of lawyers and judges do not merely *track* an independently constituted set of facts about the existence and content of legal standards, but are rather partly *constitutive* of these. Consider again our example from trusts law doctrine. That Jack is legally required to manifest and prove his declaration of trust in writing is a standard the existence and content of which cannot be considered apart from the thoughts, arguments, reasoning, and decisions that lawyers and judges have made about fact situations of this kind. Contrariwise: it is precisely *because* lawyers and judges have and continue to think, argue, reason, and make decisions in the way that they do—in particular, the way they invariably regard certain acts or events such as the Law of Property Act 1925 as having legal significance and, moreover, use them to guide and constrain their judgements of what the law requires in the instant case—that in part explains why this standard obtains in English law.

Now, strictly speaking, the principle that legal standards are judgement-dependent does not, in and of itself, entail that any plausible answer to the constitutive question must begin by appealing to the type-1 dispositions of lawyers and judges in a given jurisdiction. To be sure, such accounts most certainly *do* have to appeal to certain

descriptive facts about what legislatures and courts have said and done, *in the past*: facts, that is to say, about how they *decided* in one way or another on such-and-such an occasion. It does not follow, however, that the relevant descriptive facts should be understood in dispositional terms. Quite the opposite. This, I assume, is something that we can legitimately disagree about. So let me now explain what turns on this issue, before then making a more concrete case for the claim that the relevant descriptive facts should indeed be understood dispositionally.

Consider the following quotations from Mark Greenberg and David Plunkett respectively:

Nowadays it is uncontroversial that law is created by people—more precisely, that the content of the law is in part the result of the actions, decisions, and utterances of people. Paradigmatically, the relevant actions include the enactment of statutes and regulations and the decision of litigated cases. But what exactly is the relation between the law-creating actions and the content of the law?¹⁸

Although there is wide agreement among contemporary legal philosophers about what explains the legal facts (i.e., the true legal propositions that comprise legal content) in a given jurisdiction at a given time, it is essentially common ground that legal facts are not ontologically primitive facts, in the sense that their obtaining is always capable of being explained by reference to other, more basic facts. In particular, it is common ground that social facts are among those basic facts. In this context, the social facts can be understood to be contingent, descriptive facts about people's actual actions, utterances, dispositions, attitudes, and mental states, as well as those contingent, descriptive facts about the products that people have produced, such as facts about the meaning of the texts they have written.¹⁹

These are representative of the current tendency to frame debate on the constitutive question along the following lines. The legal theorist sets to work on two domains of facts. His task is to explain how a higher-order domain of *normative* facts about what the law requires in a given jurisdiction obtains in virtue of a lower-order domain of *descriptive* facts, and as regards the latter we cast our nets extremely widely. Facts about language, history, practice, mental states, and dispositions—all of these may or may not feature among the constituents or determinants of legal standards, but we need not specify which at the outset. On the contrary, inasmuch as all such facts are contingent, and perforce describable in non-intentional terms, they are all of a piece for

our purposes. Since the constitutive question calls on us chiefly to explore the *relation* between legal rights and duties and descriptive facts, so understood, we really ought to press ahead with that puzzle without getting hung up initially on the question of which descriptive facts we are talking about.

Up to a point, there is much to commend this coarse-grained individuation of the descriptive facts that must, somehow or other, be inputs for viable answers to the constitutive question. Different theories of law, no doubt, will wish to emphasize different descriptive facts in their constitutive explanations of legal standards; different *explanantia* of the *explanandum*, in other words. Thus, dialectically speaking, the constitutive question needs to be stated at a sufficiently high level of abstraction, without thereby taking too strong a view at the outset on which descriptive facts we are dealing with, so as to leave logical space for all sorts of views concerning how such facts make it the case that the law requires what it does.

But there is a price for our being so ecumenical. Whatever we gain dialectically speaking, something important is overlooked when we do not insist on a finer-grained individuation of the descriptive facts that must be inputs for viable answers to the constitutive question. Both in connection with the integration challenge for the legal domain and more generally speaking in legal theory, the indications are that the relevant descriptive facts must be understood in dispositional terms.

I propose to motivate this idea by considering the pervasiveness of counterfactuals in our thought and talk about the law. Here I am using ‘counterfactuals’ in an ordinary, non-technical way. There is, of course, much debate about how counterfactuals differ from strict conditionals, and whether they can be analysed within the framework of possible worlds.²⁰ I assume no particular theory of their compositional semantics, still less an account of what grounds our knowledge of such statements. On the contrary, for present purposes, I want to rely merely on an intuitive understanding of counterfactuals.

‘I wish Anne had come to the party, because she would have enjoyed herself.’
‘If Beth had woken up on time, then she would have caught the train.’ ‘Had it not rained on Saturday, Clare would have mowed the lawn.’

Counterfactuals such as these, conditional statements of a type that express the idea that something is or will be the case *provided* that some other situation is realized, are generally speaking puzzling for a host of reasons. This is because our ordinary cognitive capacity to handle counterfactual conditionals carries with it philosophical questions about the nature of modality. On the one hand, all of us make judgements

about how things could, must, or could not have been. On the other hand, what is it exactly that grounds these judgements? How is modal knowledge possible? In what does such knowledge consist?

Anyway, the point is that counterfactuals have a life in the law. Indeed, modal considerations abound in legal disputes; for counterfactual thinking is often an essential component of determining what the law requires on a particular issue, which makes it difficult to overestimate the extent to which counterfactual considerations intrude at various stages of legal decision-making.

Take the law of torts. As Robert Strassfeld writes:

At bottom, all determinations of tort damages imply a comparison between the actual world and a counterfactual one in which the defendant had not injured the plaintiff. Often that comparison gives the trier of fact little pause. For example, if the factfinder concludes that the defendant broke the plaintiff's leg, it should have little trouble deciding that the medical costs of mending the leg are attributable to the defendant and should be included in the damage award. Yet often we require the factfinder to engage in much more uncertain inquiries to establish the damage award. For example, in a wrongful death action, the factfinder probably will be asked to determine: the job history that the decedent would have had and the stream of income that she would have generated; the value of the services that she would have rendered and of the goods that she would have produced for her family; the self-maintenance costs that she would have incurred; and her probable life expectancy, all in a counterfactual world in which the accident that took her life had not occurred.²¹

It bears emphasizing that these considerations are by no means limited to the law of torts. Quite the opposite: a moment's thought suggests that modal thinking is omnipresent in numerous and diverse areas of the law. The examples are all around us: the *cy-près* doctrine in the law of trusts, for instance, may require the court to determine what the testator *would* have desired had she known that circumstances would frustrate her bequest;²² and, in EU competition law, we regularly see the Commission for the purposes of assessing the competitiveness of a given market evaluating counterfactual scenarios in which this or that merger *had* not taken place.²³ Causation in criminal law provides further illustration.²⁴ The courts continue to limit responsibility by appealing to the causal distinctions embedded in ordinary thought, with their emphasis on voluntary interventions and abnormal or coincidental events as factors negating responsibility. So

the general moral to be drawn is that there can be no doubt that counterfactuals have a life in the law.

The salient upshot, I suggest, is that we should insist on a finer-grained individuation of the descriptive facts that must be inputs for viable answers to the constitutive question. As our examples from the law of torts, trusts, EU competition law, and criminal law demonstrate, the relevant descriptive facts cannot merely be facts about what legislatures and courts have said and done, in the past: facts, that is to say, about how they decided in one way or another on such-and-such an occasion. On the contrary, what makes it the case, if only in part, that the plaintiff is entitled to damages; that the *cy-près* doctrine applies; that some merger is anti-competitive; and that the defendant is responsible for the offence is, rather, the descriptive facts that lawyers and judges are disposed to assess counterfactual situations in the ways that they do: facts, that is to say, about how they *would* or *would have* judged those matters that come before them in their official capacity. Hence, whatever we gain dialectically speaking on the present ecumenical and coarse-grained individuation of the descriptive facts that must be viable answers to the constitutive question, the life of counterfactuals in law is lost on this approach, which to be sure is one incentive for our construing the relevant descriptive facts dispositionally.

The other incentive for our doing so is more general, which connects the seemingly digressive topic of counterfactuals in law with the present argument. Of course, not *every* legal question turns on counterfactual considerations. As a result, a broader argument is needed before we can accept the claim that any plausible answer to the constitutive question must begin by appealing to the type-1 dispositions of lawyers and judges in a given jurisdiction.

I want to defend this claim, quite simply, by considering the following conjecture. Let us suppose, for the sake of argument, that lawyers and judges in a given jurisdiction, say the UK, do *not* have the material type-1 dispositions highlighted above. This would entail that they are not disposed, *consistently* and with some *regularity*, to regard certain facts or events, such as the enactment of statutes and the adjudication of cases, as having legal significance. Imagine that on Monday a trust of land case comes before the judges acting in their official capacity. They duly observe the Law of Property Act 1925, let us assume, and hold that the oral declaration at issue does not suffice to create a valid trust of land. On Tuesday, however, a case with near identical facts, let us suppose, comes to court. This time around they ignore the relevant statute, and so decide the case the other way.

What has gone wrong here? What we should be starting to see, I suggest, is that if the relevant descriptive facts are not understood in dispositional terms, a tension arises with the second principle that we invoked in suggesting that our pre-theoretical conception of law is such that we should expect or anticipate a simultaneously acceptable metaphysics and epistemology of legal standards. That principle, to reiterate, is that whatever else legal standards are, exactly, they must in principle be able to serve as intelligible guides to human conduct. For it is precisely this property of legal standards that enables us—in very many normal cases effortlessly, even thoughtlessly—to acquire true beliefs about what the law specifically requires on an everyday basis (e.g. the date by which I should file my tax returns or whether I can smoke on the London Underground), or obtain reliable advice from specialists on more technical issues (such as whether I can sue in private nuisance notwithstanding my lack of a proprietary interest in the relevant land). This is not, as we have seen, an accidental, superfluous, or contingent aspect of what legal standards are and how they work. Far from it: this rather goes to the very heart of our pre-theoretical notion of *what it is* for there to be a legal standard governing this or that issue.

How, then, do legal standards acquire this property? Part of the answer, one might naturally suppose, has to do with the way in which disputes about the existence and content of legal standards are settled in some regular fashion. What makes it the case that English law requires Jack to manifest and prove his declaration of trust in writing, in other words, is not merely that lawyers and judges observe what legislatures and courts have said and done in the past. It is rather made possible, in part, by the way lawyers and judges invariably, consistently, and with some regularity observe just those facts or events. Hence, in order to capture this innocuous principle about how legal standards guide conduct and thereby function as they are supposed to, we cannot make do with certain descriptive facts about what legislatures and courts decided on such-and-such an occasion. Instead, we have to proceed on the footing that the relevant descriptive facts are more complex dispositional facts about how lawyers and judges *would* or *would have* judged those matters that come before them in their official capacity.

Let us run with the idea, then, that any plausible answer to the constitutive question must begin by appealing to the type-1 dispositions of lawyers and judges in a given jurisdiction. I emphasize that to say this much is assuredly not to take any specific theoretical perspective on *why* that is so exactly; *how*, in particular, that embryonic thought may be further developed. Nor is it to reveal the many hurdles that would need

to be surmounted when it comes to making that thought a convincing one. On the contrary, as I shall now go on to explain, the proposition that the type-1 dispositions of lawyers and judges are partly constitutive of legal standards is just as much a source of further perplexity as it is of insight. To be sure, the proposition is slightly more concrete than our earlier principles concerning, first, the judgement-dependence of legal standards and, secondly, the way those standards are in principle able to serve as intelligible guides to human conduct. All the same, that proposition is still abstract and intuitive enough to be accepted by all comers as we now set about drawing sharper parallels with our earlier general discussion of dispositions, standards, meaning, and content with a view to establishing two conditions that constrain any plausible answer to the constitutive question.

14. The Objectivity Condition

Everyone makes mistakes, and lawyers are no exception; judges get the law wrong, students overlook salient authorities in their examinations, and sometimes lawyers fail to spot important differences between two cases. Doubtless all of this necessitates there being some logical space between our judgements of what the law requires and what it in fact requires; but what if anything is theoretically significant about that? Why dwell on the phenomenon of mistake or error about what the law requires in a given jurisdiction?

The phenomenon reminds us why the constitutive question and the problem of legal knowledge are not identical; for it is one thing to provide an account of what makes it the case that some fact p holds, say, about what English law requires Jack to do with respect to his trust of land, and it is quite another thing to elucidate the constitutive elements of our knowledge that p . This is because although our thinking or believing that p is closely connected to the fact that p , it is not itself identical with that fact. On the contrary, the very possibility of being *mistaken* about what the law requires suggests that intermediate links establish the connection between individual judgement and case in the legal domain; such that much more needs to be said about what these links are and in what they consist.

Indeed, the very possibility of there being mistake or error about the existence and content of legal requirements presents us with an explanatory burden. What we have to contend with, more precisely, is the way our thought and talk about the law presupposes a strongly objective standard that guides correct judgement of what it

specifically requires in the instant case. It is precisely this standard, to be sure, that is invoked by lawyers when they hold that judges' decisions misrepresent settled doctrines on a particular point of law, when teachers quite rightly complain that students fail to apply the law to the relevant facts in their essays, and when judges dismiss counsels' submissions on the grounds that they misconceive the rationale of previous authorities. It is by no means clear how we should make sense of this, however. What does this presupposition that there are right answers to legal questions amount to, exactly? Should it be taken at face value? Most importantly of all, how is it supposed to gesture towards an objectivity *condition* that needs to be satisfied by candidate answers to the constitutive question, and thereby any adequate solution of the integration challenge for the legal domain?

14.1 Objectivity Generally

This is all a long way of saying that my subject in this section will be objectivity in law;²⁵ so as to get a better grip on our topic, however, I want to begin by discussing objectivity in more general terms.

What exactly do we have in mind, then, when we think of a question in some area of enquiry as an *objective* issue? Although there is, of course, no consensus on how we should understand this central concept of modern philosophy, in many ways this is how it should be: questions about the possibility and character of objectivity are at the heart of all metaphysical disputes today; hence the scope for legitimate disagreement about how we best refine our ordinary notion of it.²⁶

Let me start therefore by stipulating what I mean by objectivity, defining the relevant concepts, and examining some of the issues that they raise.

I propose to understand objectivity as a general property of the facts, propositions, statements, notions etc. that are associated with any one specific domain. Consider, for instance, the domains of mathematics, ethics, and modality respectively. Here we wish to explore the objective standing of questions such as whether it is impossible to obtain a negative result by squaring a real number, whether there are any moral facts, and whether there exist possible worlds understood as concrete entities with a precise spatial-temporal location; and it is worthwhile to note a few things about orientating our enquiry in this way.

First, our designated sense of objectivity has nothing to do with impartiality. Certainly no harm is done when we describe, for instance, the Chilcot report as

objective, which is presumably to say that it provided an unbiased or disinterested investigation of the UK's involvement in Iraq.²⁷ This *procedural* sense of objectivity is not our focus, however. As I say, our concern is with the objective standing of the facts, propositions, statements etc. that are associated with the specific domain that interests us.

Secondly, we cannot equate objectivity with either determinacy or vagueness. Suppose Locke was right about secondary qualities.²⁸ This entails that our judgements of colour, taste, and smell do not track genuine properties of objects, but rather *project* the sensations and experiences that they are apt to produce in our observations of the world. It follows that our judgements of secondary qualities may be perfectly determinate and subjective at the same time. To illustrate, if there is nothing more to something's tasting salty, say, than its being apt to produce this experience in subjects under normal conditions, then my judgement that these crisps are salty is both *determinate* in that there is no doubt in my mind about what these crisps taste like, and *subjective* in that I could not be wrong in this. Similar considerations apply to vagueness. My judgement that Jones is 'tall' may be indeterminate because it contains a vague predicate. It does not follow that there is no objective fact of the matter that Jones is tall. Understood as a measure of vertical distance, height is a perfectly objective property; meaning that it does not account for the indeterminacy of my judgement that Jones is tall. What makes my judgement vague, rather, is that in and of itself the predicate 'tall' effects an overly coarse discrimination between central and borderline cases.

Finally, notice that I am not especially concerned to distinguish between the so-called metaphysical, semantic, and epistemological senses of objectivity: the *metaphysical* sense in which a domain is objective just in case there exist certain objects or individuals that are distinctive of that domain; the *semantic* sense that makes objectivity turn on whether we can ascribe truth-values to certain classes of statement; and the *epistemological* sense that makes objectivity contingent on the possibility of our attaining knowledge of truths about the specific domain that interests us. Much ink has been spilt examining these senses of objectivity, and there is no shortage of proposals that aim at prescribing which of them should be considered primary when it comes to unpacking what we have in mind when we think of a question in some area of enquiry as an objective issue.²⁹ Yet I do not think we need to get into that for present purposes. We can all agree that our ordinary concept of objectivity is multifaceted—one which bears a complex relation to truth, knowledge, and cognate concepts—so unless and until

we have some particular axe to grind on the relation between language, thought, and the world, the best course for us is to remain open-minded about it at this stage.

Now, perhaps the most common way of elaborating our designated sense of objectivity is by insisting that a domain is objective if and only if the facts, propositions, statements etc. that are associated with that domain are in some sense *mind-independent*. This is the approach to objectivity that has featured most prominently as a dividing line between *realist* and *anti-realist* views of different areas of thought and discourse; and we can lay hold of the basic idea by revisiting briefly an example used in the previous chapter.³⁰

Quarks and gluons are elementary particles—fundamental constituents of matter.³¹ Facts and propositions about their underlying nature, then, by hypothesis, obtain independently of any individual or community having thought about or engaged with them. *That* physicists and the population at large hold certain beliefs about the nature of quarks, say, does not, it seem, determine the truth of propositions about what they are and how they work. It is, of course, a matter of some controversy whether these contingencies have a bearing on the meaning of the term ‘quark’;³² but we have no need to explore this issue further, because our sole concern here is merely with the truism that there is no constitutive relation of dependence between the existence and nature of any particular quark and the cognitive activity of human beings.

We can make this point sharper by borrowing a distinction from Crispin Wright.³³ Take some proposition *p*, and suppose that our judgements co-vary with the facts about the obtaining of *p*. There are two very different ways of explaining this covariance: on the one hand, our judgements may just be extremely good at tracking some independently constituted state of affairs; on the other hand, our judgements may themselves be part of the story as to why *p* obtains in the first place.

Quarks provide us with a paradigmatic example of the former sort of case. Here our judgements track some independently constituted states of affairs. It seems, more specifically, that facts about the existence and nature of quarks in no way depend on our beliefs about them or the methods of investigation that led to the formation of these beliefs. In a word, facts and propositions about these elementary particles are *judgement-independent*.

Consider, by contrast, the case of money. That this piece of paper in my pocket is a £10 note is not a basic fact about the universe: its physical properties do not distinguish it from other pieces of paper; and yet I used it to pay for a train ticket and a cup of coffee this morning. What makes this possible, essentially, is the phenomenon of

confidence: the widely shared practice in the UK of accepting pieces of paper like the one in my pocket as a medium of exchange for goods and services. Absent such facts about our beliefs, behaviour, and attitudes the piece of paper in my pocket would not have the monetary significance that it has. This is what it means to say that facts about money are *judgement-dependent*.

The present point is that the proposal to understand objectivity along the lines suggested by the debate between realism and anti-realism—the insistence that a domain is objective if and only if the facts, propositions, statements etc. that are associated with that domain are in some sense independent of human minds and their judgements—has its pros and cons. From one point of view, the proposal captures the datum that we confront an objective world: that what there is and what it is like does not essentially depend on our thinking or believing that it does. From another point of view, lest we wish to abandon the idea that there are indeed objective facts about things like the state of the economy (which, among other things, would make a mockery of our talk about the markets doing this or that) we should expect our conception of objectivity to explain how such facts can be objective, notwithstanding their being, if not *constituted* by the cognitive activity of human beings, then at the very least historically or causally dependent on it.

One creative way out of this impasse is to lay stress in our conceptions of objectivity, not on what there is and what it is like, but rather on the standards that govern our thought and talk about a given subject matter. Just such an approach has, of course, been popular in practical philosophy: take John Rawls's work on 'reflective equilibrium' and T.M. Scanlon's 'contractualist' account of what we owe to each other.³⁴ The respective details of these accounts of how we should set about selecting principles of justice to regulate the basic structure of society and determining what we have most reason to do are controversial, to be sure; all the same, many would follow Rawls and Scanlon in their suggestion that the possibility and character of objectivity in ethics does not turn on our causal interaction with independently existing moral properties or states of affairs. Certainly, objectivity in ethics demands that there be standards of reasoning about what we have most reason to do; standards that yield determinate answers in the vast majority of cases; answers which are, moreover, in principle distinct from those reached from the perspective of any one deliberating agent. It does not follow from this, however, that there are any great metaphysical or epistemological mysteries to address about what reasons are and how we get in touch with them.

It bears emphasizing that there is a perfectly general version of this view to be found in Thomas Nagel's, *The View from Nowhere*.³⁵ Here, famously, Nagel urges us to think about objectivity as a 'method of understanding'. On this approach, we do not reserve the title of objectivity only for those domains that are populated by mind-independent objects, entities, and other individuals; instead, we hold that a domain is objective if and only if its subject matter is such that we can adopt a detached perspective on it; one which is made possible by the obtaining of certain standards that guide and constrain our judgements.

Scanlon expresses the thought very well with reference to arithmetic.³⁶

The example of mathematical judgments may be helpful here. My judgments about arithmetic are judgments about a subject matter independent of me in the sense that they involve claims (not about me) about which I can be mistaken. But understanding arithmetic as objective in this sense does not require accepting a form of arithmetical Platonism. It is enough that there are standards of arithmetical reasoning such that when I fail to follow them I am wrong. Arithmetical competence is a matter of mastering this form of reasoning and, in general, being able to tell when it is being done well, when badly. The thinking of a good mathematical reasoner "represents" or "tracks" the truth about arithmetic insofar as it takes into account the right considerations in the right way. This need not be construed as a matter of being in touch, through some mechanism analogous to sense perception, with mathematical objects which exist apart from me.

Similarly, in order for judgments about reasons to be taken to be about some subject matter independent of us in the sense required for it to be possible for us to be mistaken about them, what is necessary is for there to be standards for arriving at conclusions about reasons. Conclusions about reasons that can be reached only through modes of thought that are defective by these standards are mistaken. It is not necessary, in order to explain the possibility of being mistaken, to construe the relevant subject matter in a metaphysical way as existing outside us. The question of whether there are standards of the required sort is a substantive one within the subject in question—a matter of whether there are conclusions and ways of arriving at them that we have no reason to regard as defective. It need not be a metaphysical question about what exists or an epistemological one about how we are in touch with it.

Such an approach to objectivity has much in its favour; although one can easily overestimate the differences between it and the earlier approach that makes mind-

independence central. To flesh this out, the most helpful starting point in understanding objectivity, it seems to me, is to ask what objectivity is not. It should be uncontroversial that if some domain is objective, there must be some logical space for mistaken judgements or erroneous beliefs about its distinctive subject matter. We cannot, after all, meaningfully speak of there being *facts* of the matter about the existence of any particular quark or the state of the economy unless and until we are, in principle, able to be wrong or mistaken about them.

Now, although they do so in rather different ways, this is, I think, an insight that is, at bottom, shared by both of the approaches to objectivity examined thus far. In light of its focus on objects or individuals that are independent of human minds and their judgements, the approach to objectivity that has featured most prominently in the debates over realism suggests *one* way of being mistaken about a given subject matter; and with its focus on the standards in virtue of which I can draw correct conclusions about a given subject matter, the approach suggested by Nagel, Rawls, and Scanlon gestures towards *another* way of being mistaken.

Indeed, if I believe that protons rather than quarks and gluons are elementary particles, then my belief does not track the truth about reality and its character; and if I believe at the current time of writing that £1 is worth 6.93 Euros, then I have failed to take into account the right considerations in the right way. Either way, *the possibility of being mistaken is what counts*. Both of the approaches examined thus far stem, we might say, from a more basic or underlying sense of what it takes for some domain to be objective. To sum this up, as soon as we understand the mark of objectivity to consist in the possibility of there being mistake or error about a given subject matter, we can have the best of both worlds: a sufficiently flexible conception of objectivity that both captures the datum that we confront an objective world *and* accounts for the objectivity of those facts that are, if not constituted by the cognitive activity of human beings, then at the very least causally or historically dependent on it.

14.2 Objectivity in Law

So far I have been discussing objectivity in general terms. My principal suggestion has been that the mark of objectivity consists in the possibility of there being mistake or error about a given subject matter. It must be granted, of course, that my discussion amounts to a short and therefore necessarily very incomplete treatment of one of the central concepts of modern philosophy. All the same, what I have said does serve to

tease out the root idea underlying two influential ways of elaborating our designated sense of objectivity; hence it should prove helpful as we set about tackling the issue of objectivity in law.

Is there an objective fact of the matter about what the law requires in a given jurisdiction? Many people think that the legitimacy of adjudication turns on this question.³⁷ If so, it follows that what I have to say here both dovetails with and may very well contribute something towards this broader discussion. Be that as it may, I shall forgo consideration of this in what follows; for in this chapter, to be clear, I want to confine myself exclusively to the narrower task of establishing an objectivity condition that needs to be satisfied by candidate answers to the constitutive question, and thereby any adequate solution of the integration challenge for the legal domain.

Given what has been said thus far, the basic idea is that we should expect or anticipate a simultaneously acceptable metaphysics and epistemology of legal standards to explain how, why, and in what way we can be mistaken about their existence and content. This expectation is borne out of two considerations: first, our general discussion of objectivity points in this direction, because if I am right that the mark of objectivity consists in the possibility of there being mistake or error about a given subject matter, it follows that accounting for objectivity in law requires us to explain how and why that is possible in the legal case; secondly, in keeping with our stated policy in the previous chapter of focussing on constructive rather than defensive solutions to the integration challenge for the legal domain, it behoves us to make as best sense as we can of the intuitive data with which we began this section; in particular, the strongly objective standard presupposed by our thought and talk about ‘getting the law wrong’.

Indeed, the more specific puzzle that we have to address is the product of two thoughts; which although inherently plausible enough in themselves, nevertheless, pull in opposite directions. On the one hand, if there are facts about what the law requires in a given jurisdiction, these are decidedly unlike facts such as the existence of any particular quark, which as we have seen obtain independently of any individual or community having thought about or engaged with them. Quite the opposite: more in keeping with our earlier example of money, legal practice presents us with an area of intentional human activity where the beliefs, attitudes, and judgements of lawyers and judges do not merely track an independently constituted set of facts about the existence and content of legal requirements, but are rather partly constitutive of these. On the other hand, lest we render nonsensical the distinction between a first and a third in law

exams or overlook the way judges often dismiss counsels' submissions on the grounds that they misconceive the rationale of previous authorities, for instance, as I say, it seems equally clear that candidate answers to the constitutive question must leave sufficient room for mistake or error about what the law requires on a particular issue. Combining those two thoughts together, then, the explanatory burden that we have to discharge in formulating the objectivity condition is one of reconciliation: wherein lies a convincing account of how it is possible for lawyers and judges to be mistaken about the existence and content of legal standards, given how their beliefs, attitudes, and judgements are partly constitutive of those facts about what the law requires in a given jurisdiction?

14.3 Rejecting the Model of Secondary Qualities

Here I think it is helpful to imagine a continuum that represents three broad options: three candidate ways of modelling the scope and character of mistake or error about the existence and content of legal requirements.³⁸

At one extreme is the view that individual judgement and case necessarily coincide in the legal domain. Our earlier discussion of taste among other secondary qualities gives us a preview of how one might try to develop such a position. And it is precisely at this point where our discussion of objectivity connects with the programme of legal dispositionalism. If there is nothing more to something's tasting salty than its being apt to produce this experience in subjects under normal conditions, then individual judgement and case necessarily coincide here; for there is no standard governing my judgement, say, that these crisps are salty: nothing in virtue of which my judgement on this score could turn out to be mistaken. Likewise, if there is nothing more to something's being a legal standard than lawyers and judges being disposed to constrain their judgements of what the law requires with reference to it in the course of their practice, then we have a further instance where individual judgement and case necessarily coincide: no standard governing my judgement, say, that English law requires Jack to manifest and prove his declaration of trust in writing; nothing in virtue of which my judgement of what the law requires in a given jurisdiction could turn out to be mistaken.

In many ways, this proposal is reminiscent of a suggestion made by Oliver Wendell Holmes, which, give or take a few premises, was later taken up by the American Legal Realists; namely, that we best understand law *predictively*, which is to

say that in our judgements involving the existence and content of legal standards we are essentially concerned to estimate the likelihood of lawyers and judges deciding one way or another in matters that come before them in their official capacity.³⁹ Let me stress that nothing turns on my attribution, however: I mention this proposal in passing, not so as to take it seriously, but rather heuristically as a way of teasing out two decidedly more plausible options when it comes to modelling the scope and character of mistake or error about what the law requires in a given jurisdiction.

Indeed, the notion that individual judgement and case necessarily coincide in the legal domain is plainly a nonstarter. It must be uncontroversial that we should expect a richer standard of objectivity in law. Whatever the case may be with secondary qualities, our practices of marking law exams and making submissions in court, among others, as I have said, suggest that we should expect or anticipate some logical space between how some individual judges or believes the law to be, on the one hand, and what it in fact requires, on the other; something which is all but explained on the present proposal.

To see this, remember that the proposal starts from a perfectly correct appreciation of the truism that facts about legal standards, much like facts about the state of the economy, are in an important sense *judgement-dependent*, and it is instructive for us to bear this in mind as we proceed. There can be no doubt, more specifically, that part of what it is for English law, say, to require Jack to manifest and prove his declaration of trust in writing is for English lawyers and judges to be disposed in the course of their practice to regard, among other things, statutes emanating from the Westminster Parliament, such as the Law of Property Act 1925, as dispositive in reaching decisions on issues that come before them in their official capacity. Absent such facts about their beliefs, behaviour, and attitudes the conclusion that oral declarations do not suffice to create valid trusts of land in English law would not have the legal significance that it has.⁴⁰

Still, the proposal goes wrong in mistaking the part for the whole. Suppose, to flesh this out, a student of mine believes that whether an oral declaration suffices to create a valid trust of land essentially depends on the claimant's *hair colour*. On this view, Jack is blonde, so it follows that just such a declaration will suffice to create a valid trust of land. I will not go through all of the steps in this by now familiar Kripkean argument, which as I have already tried to intimate establishes quite conclusively that past instances of applying rules and other standards radically underdetermine what constitutes 'going on the same way as before'. I foresee no significant objection, more

specifically, to the claim that it will not suffice in order to rule out ‘bent models’ or ‘deviant hypotheses’ such as the one about hair colour simply to cite our currently settled dispositions to regard enacted statutes, decided cases, and the like as dispositive of legal standards in the course of our practice. On the contrary, it is generally impossible for any descriptive facts of practice alone to determine their own normative significance, and therefore make it the case that the practice has some particular content. This is because it must be settled *which* aspects of the practice are relevant, *why* they are relevant, and *how* it is exactly that they constitute the standards associated with the practice in question.⁴¹ This task we can only perform by appealing to something *other* than the actions, attitudes, or other contingencies of the material practice in order to determine the relevance of each. Crucially, for our purposes, in order to make room for the possibility that the participants in a social practice, such as the law, may be mistaken about what it requires, the requirements associated with the relevant practice must, by hypothesis, be constituted in part by standards external to it. Only in that way can lawyers and judges be mistaken about what the law requires, then; notwithstanding how their beliefs, attitudes, and judgements are partly constitutive of it.

14.4 The Fork in the Road

At this point, we reach a fork in the road. Here, more specifically, we are presented with a choice between *either* an appeal to conceptual truths about how legal rights and duties consist in those standards produced or endorsed by legal institutions in a characteristic way *or* substantive claims about the discrete moral impact that the practices of enacting statutes and deciding cases have on what we ought to do. Later on, in the fifth chapter of this essay, I shall associate these choices respectively with the orthodox view and the model of principle, though I daresay a brief word is needed, dialectically speaking, on why such discussion has to wait until then.

The orthodox view and the model of principle are our leading answers to the constitutive question: two competing accounts of how it is exactly that legal rights and duties obtain in virtue of descriptive facts about what legislatures and courts have said and done. Consequently, they have much to teach us, I shall suggest, when it comes to teasing out, in more precise terms, how we should model the scope and character of mistake or error about the existence and content of legal requirements. The most creative way of doing that, it seems to me, is by raising a question that is often marginalized and sometimes ignored: what do our two leading answers to the

constitutive question entail for the issue of objectivity in law? What do the orthodox view and the model of principle entail as regards the scope and character of mistake or error about what the law requires in a given jurisdiction?

But we are getting ahead of ourselves. The business of this section has merely been to expound the objectivity condition *that* candidate answers to the constitutive question must leave sufficient room for mistake or error about the existence and content of legal rights and duties. And therein, to my mind, lies the first of three conditions that constrain any adequate solution of the integration challenge for the legal domain. On the one hand, there can be no question that the dispositions of lawyers and judges highlighted above are partly constitutive of legal rights and duties. On the other hand, they cannot be wholly constitutive of what the law requires in the instant case. A simultaneously acceptable metaphysics and epistemology of legal standards, then, simply must square this circle. In other words, we cannot accept any theory that neither explains nor illuminates how lawyers and judges can be mistaken about the existence and content of legal standards, *given* that their settled dispositions to regard enacted statutes, decided cases, and the like are partly constitutive of them.

15. The Relevance Condition

I am currently in the process of establishing two conditions that constrain any plausible answer to the *constitutive question*. That question, to reiterate, is the puzzle of how it is exactly that descriptive facts about what legislatures and courts have said and done make it the case that certain normative standards obtain in a given jurisdiction at a given time. The previous section aimed at expounding an *objectivity* condition that needs to be satisfied by candidate solutions to this pressing theoretical problem. What I want to show, in the present section, is that these solutions have also to come to grips with the *relevance* condition.

Consider our earlier example from trusts law doctrine.⁴² Jack wishes to settle Blackacre upon Jill under a trust. Granted the law requires him to manifest that trust in writing (ϕ for short). But in virtue of what does this standard obtain? What makes it the case that the law requires what it does? That the law requires Jack to ϕ constitutively depends, no doubt, on enacted statutes and decided cases. Yet those paradigmatic ‘sources of law’ are ultimately descriptive facts about what legislatures and courts have said and done. How is it possible, then, that such facts constitute the legal standards that

they do? How do the facts, for instance, that 150 Members of the House voted in a certain way and that judges as a matter of settled practice are not disposed to enforce oral declarations of trusts of land make it the case that Jack is legally required to ϕ ?

There is an understandable tendency of philosophers to miss the issues here. True, English lawyers have little difficulty identifying the Law of Property Act 1925 as being especially relevant to Jack's case. And yes, section 53(1)(b) of the Act states quite plainly that, 'A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.' Even so, the concerns are not so easily dismissed; for the constitutive question demands that we provide an account of *what it is* for the statute to have that effect of legally requiring Jack to ϕ . The nerve of the relevance condition, then, is that even if we agree, more abstractly, that enacted statutes and decided cases are relevant in determining what the law requires on a particular issue, we cannot stop there: we have to go further and specify *how* and *why* that is so, what *makes* them relevant, and what it is exactly *about* these practices that generate the legal rights and duties that obtain in a given jurisdiction at a given time?

As we have seen, the intuitive case for the objectivity condition lies in this. Everyone makes mistakes, and lawyers are no exception; judges get the law wrong, students overlook salient authorities in their examinations, and sometimes lawyers fail to spot important differences between two cases. Granted all of this necessitates there being some logical space between our *judgements* of what the law requires and what it *in fact* requires. The difficulty and nerve of the objectivity condition, then, is to explain how this is possible given the *judgement-dependence* of legal standards: the datum that part of what it is for some fact *p* to hold with respect to what the law requires on a given point is for a community of lawyers and judges to judge, believe, or accept that *p*.

Now, although it bears an intimate relation to the objectivity condition, the relevance condition is not the same. It too takes as its starting point a basic datum or *explanandum*: that legal standards constitutively depend for their existence and content on descriptive facts about what legislatures and courts have said and done. And it too gives rise to a pressing difficulty: what, if anything, accounts for the relevance of such facts in explanations of how they constitute the legal standards that they do? The upshot is that the relevance condition shares with the objectivity condition the function of specifically constraining adequate responses to the constitutive question in the larger integration challenge that interests us. Yet the relevance condition is not so much concerned to leave sufficient room for *mistake* or *error* about the existence and content

of legal requirements as it is to press the importance of appealing to some candidate facts *external* to the practices of enacting statutes and deciding cases, understood in descriptive terms, in order to attain a sufficiently intelligible appreciation of that which constitutively explains their relevance and impact in determining what the law requires in the instant case.

Following the procedure adopted in previous sections, we can begin expounding the relevance condition by drawing on our general discussion of dispositions outside the law. As I have already tried to intimate, many of the issues that interest us in the legal case also arise in connection with some other phenomena—most notably for our purposes, linguistic meaning and mental content—since they provide us with analogous cases where normative standards obtain in virtue of more basic actions, attitudes, and other contingencies.⁴³ Given that the relevant theoretical choices are posed particularly clearly in these domains, let me briefly rehearse the general morals that I earlier sought to draw as we set about establishing a relevance condition that constrains any plausible answer to the constitutive question.

Facts about what we are disposed to do in the course of our practice are descriptive and contingent facts about us. They therefore differ in kind from any normative facts that determine what we ought to do. Dispositions cannot, therefore, feature alone in the constitutive explanation of any standard, because they are in and of themselves insufficient to ground two essential features associated with any intentional practice. The objectivity condition, to be clear, picked up on the first of these features. Intentional practices, such as that of determining what the law requires on a given point, are marked by the possibility that the participants in some such practice may be mistaken about its distinctive subject matter, so a brute appeal to the dispositions manifested in the course of that practice effectively surrenders the notion of there being a standard that governs how we *should* or *ought* to judge the relevant subject matter independently and antecedently of our having any dispositions to do so.

The relevance condition, then, picks up on a connected feature of intentional practices. Consider again Kripke's argument from finitude. Our dispositions to engage in some practice one way or another are inherently finite. As a result, those dispositions do not fix the content of the material practice, and they do not determine how the participants engaged in some practice are specifically required to judge its subject matter in the instant case. For we can always construct further 'bent models' or 'deviant hypotheses', such as the one about hair colour, that are perfectly consistent with our currently settled dispositions to regard enacted statutes, decided cases, and the like as

dispositive of legal standards in the course of our practice. It must, therefore, be settled which aspects of the practice are relevant, why they are relevant, and how it is exactly that they constitute the standards associated with the practice in question. This task we can only perform by appealing to something *other* than the actions, attitudes, or other contingencies of the material practice in order to determine the relevance of each.⁴⁴

So we have reached a second fork in the road. Here, once again, we are presented with a choice between *either* an appeal to conceptual truths about how legal rights and duties consist in those standards produced or endorsed by legal institutions in a characteristic way *or* substantive claims about the discrete moral impact that the practices of enacting statutes and deciding cases have on what we ought to do. I shall later on, therefore, again be associating these choices respectively with the orthodox view and the model of principle; and, dialectically speaking, I suggest that we find ourselves in precisely the same situation as regards the relevance condition as we do with respect to the objectivity condition.

To flesh this out, the orthodox view and the model of principle are our leading answers to the constitutive question: two competing accounts of how it is exactly that legal rights and duties obtain in virtue of descriptive facts about what legislatures and courts have said and done. Consequently, they cannot be ignored, I suggest, when it comes to teasing out, in more precise terms, what it is exactly that explains the relevance and impact of the material dispositions of lawyers and judges in a constitutive explanation of legal standards. We shall therefore have to address the following questions: how should we understand our two leading answers to the constitutive question? Which, if any, of them is to be preferred? How, if at all, might we integrate these perspectives in a more enviable constitutive explanation of legal standards that gives the material dispositions of lawyers and judges pride of place?

But we are getting ahead of ourselves. The business of this section has merely been to expound the relevance condition *that* candidate answers to the constitutive question must appeal to something *other* than the aforementioned dispositions of lawyers and judges in any plausible story of what makes it the case that the law requires what it does. And therein, to my mind, lies the second of three conditions that constrain any adequate solution of the integration challenge for the legal domain. On the one hand, there can be no question that type-1 dispositions, as I call them, are indeed partly constitutive of legal rights and duties. On the other hand, they cannot be wholly constitutive of what the law requires in the instant case. Our conclusion at this stage, then, is that any simultaneously acceptable metaphysics and epistemology of legal

standards has at least two hurdles to surmount. First, the objectivity condition demands that we cannot accept any theory that neither explains nor illuminates how lawyers and judges can be mistaken about the existence and content of legal standards, given that their settled dispositions to regard enacted statutes, decided cases, and the like are partly constitutive of them. Secondly, the relevance condition demands that we cannot fix the content of legal practice unless and until we appeal to something *other* than those dispositions in a constitutive explanation of what makes it the case that the law requires what it does.

16. Interlude: Towards a Dispositionalist Turn in Legal Theory?

Some readers may be inclined to dismiss the present chapter as little more than a long and cumbersome rehash of certain well-received ideas in general jurisprudence. In particular, it may be suggested that all too heavy weather has been made of the notion that, in and of themselves, descriptive facts about what legislatures and courts have said and done do not constitute legal standards. That notion, to be sure, is nowadays generally accepted in legal theory, and thus apparently unworthy of the extensive treatment that it has received in this chapter. So the worry is that the objectivity and relevance conditions, as I have stated them, appear of little consequence.

That estimation would be uncharitable and wrong, in any case; because although the foregoing accords with the gist of recent writing on the constitutive question, my discussion is doubtless intended to contribute something towards the ongoing debate.

I have argued, more specifically, that we should expect a dispositionalist solution to the constitutive question, one way or another. And this is, I believe, an engaging idea that merits further scrutiny. For the concept of dispositions has been largely ignored in general jurisprudence. There has, of course, been some limited discussion of them in connection with the work of H.L.A. Hart, which is unfortunate. Indeed, for the most part, there has been no systematic treatment of what dispositions are exactly, and why they speak to the metaphysical issue of what makes it the case that the law requires what it does.⁴⁵ This, then, is something that I have tried to remedy in the present chapter. I have maintained that the type-1 dispositions of lawyers and judges in a given jurisdiction must be inputs for viable answers to the constitutive question; I have tried to explain what motivates that idea; and I have further sought to indicate the hurdles that would need to be surmounted in order to make that idea a convincing one. These recommendations may, on closer inspection, turn out to be awry or mistaken for

all sorts of reasons. The point is that they are far from trivial. So, no, the objectivity and relevance conditions, as I have stated them, are not of little consequence.

It has therefore been suggested to me that my discussion in this chapter would be better presented as attempting to inaugurate a ‘dispositionalist turn’ in legal theory.⁴⁶ The thought is that just such a presentation would better capture the novelty of my thesis, and moreover draw closer attention to the engaging topic of counterfactuals in law that motivates its central ideas.⁴⁷

Maybe so; and if the reader finds that a helpful way of understanding the distinctive project of this chapter, then I have no specific objection; only the following caveats. First, be apprised that we have merely turned 180 degrees. That is to say, we have yet to examine the connection between dispositions and legal knowledge, as we shall in the next chapter, such that any assessment of the need for a dispositionalist turn in legal theory must be postponed until then.

Secondly, whatever terminology we care to use, it is vital that we stay ‘on message’. It is one thing, more specifically, to insist on a dispositionalist solution of some description to the integration challenge for the legal domain. It is quite another thing to motivate the need for a dispositionalist turn in legal theory *per se*. I am concerned solely with the former, narrower undertaking, and do not pretend otherwise. My goal in this essay is to expound the integration challenge for the legal domain, and provide a framework for its adequate solution. No more, no less. It would of course be odd if, along the way, we were unable to draw some broader morals about the proper place of dispositions in our overall conception of what law is and how it works. And, doubtless, the need to capture the life of counterfactuals in law is one such broader moral. In any case, the plan is that these morals will emerge, if at all, only indirectly. So our discussion will retain its programmatic cast. We shall, in particular, continue to specify the programme of legal dispositionalism that, to my mind, guides and constrains any adequate solution to the integration challenge for the legal domain. Any speculation as to the broader need for a dispositionalist turn in legal theory, therefore, will have to remain firmly in the background.

Notes to Chapter III

- 1 Not to be confused, of course, with Christopher Peacocke's thesis of the same name in his (1999: 13), which states that 'there is a class of concepts each member of which can be individuated, partly or wholly, in terms of the conditions for a thinker's knowing certain contents containing those concepts; and that every concept is either such a concept, or is individuated ultimately in part by its relations to such concepts'.
- 2 For helpful discussion, see Mumford (2003: 1-22).
- 3 Goodman (1990: 40).
- 4 The distinction is one of some controversy. I proceed here merely on the footing that we are owed *some* account of the categorical/dispositional distinction; however that may be elaborated or refined. See further Bird (2007: 66-7).
- 5 See especially Lewis (1997).
- 6 Nolan (2005: 102, original emphasis).
- 7 See, for instance, Kripke (1963); Lewis (1973); Stalnaker (1968).
- 8 The *locus classicus* is CB Martin (1994).
- 9 Nolan (2005: 102-3, original emphasis).
- 10 Kripke (1982).
- 11 See further Wittgenstein (1967: §§243-45).
- 12 This point is especially well developed by Boghossian in his (2008a: 16-18).
- 13 Boghossian (2008: 29).
- 14 See, for instance, Dretske (1981); Fodor (1987); Block (1986).
- 15 Bilgrami (2006: 211).
- 16 GE Moore (1903: §13).
- 17 Seminal contributions in this regard are Blackburn (1984); Wright (2001a).
- 18 Greenberg (2011: 40-1).
- 19 Plunkett (2012: 145).
- 20 See generally Anderson (1951); Edgington (2001).
- 21 Strassfeld (1992: 346).

- 22 *Re J W Laing Trust* [1984] Ch 143. See further JE Martin (2012: 478-94).
- 23 See Veljanovski (2010).
- 24 See Hart and Honoré (1985: 325-88); see too MS Moore (2009: 81-154).
- 25 Important contributions addressing the topic of objectivity in law are Brink (2001); Greenawalt (1992); Coleman and Leiter (1995); MS Moore (1985); Stavropoulos (1996).
- 26 For a helpful survey, see Brock and Mares (2007: 34-47).
- 27 See generally <<http://www.iraqinquiry.org.uk>> accessed 20 August 2016.
- 28 See further Mackie (1976: 17-20).
- 29 Important contributions here are Dummett (1991); Wright (1992).
- 30 I have taken a good deal of instruction here from Marmor (1995); Coleman and Leiter (1995).
- 31 For an excellent overview, see Greene (2000). A similar example is used in Shapiro (2011: 26).
- 32 For helpful discussion, see Achinstein (1964); Lewis (1970).
- 33 Wright (2001: 192).
- 34 See Rawls (1999: 40-6); Scanlon (1998: 55-72).
- 35 Nagel (1986).
- 36 Scanlon (1998: 63).
- 37 For helpful surveys, see Lucy (2002); Penner (2002); Schauer (2012); Atiyah and Summers (1987).
- 38 I have borrowed this way of presenting my ideas from Stavropoulos (2004). I hasten to add that my discussion of the objectivity condition throughout is heavily indebted to this article. See also Nozick (2001: 75-9); Raz (1999: 118-32).
- 39 See Wendell Holmes Jr (1897).
- 40 This, in my view, is the most important moral to be drawn from Hart (1994). I shall expand on this point in §16.
- 41 This point has been made before. See Greenberg (2004); Raz (2009: 3, 134-5); Stavropoulos (2012). Note that my phrasing in this paragraph draws on Stavropoulos (2007: 10-11); (2013: 129).

- 42 This presentation of the example draws on my (2016: 118-119).
- 43 Compare Stavropoulos's discussion of promising in his (2012: 78-83).
- 44 I am here drawing on Stavropoulos (2007: 10-11); (2013: 129).
- 45 A notable exception, to which I am much indebted, is Greenberg (2006: 271-6). Again, however, Greenberg's discussion of what he calls '*Hartian dispositions*', and their potential fruit when it comes to addressing the constitutive question, is focussed squarely on the prospects of Hart's prominent thesis that there are rules of recognition at the foundations of legal systems. My aim in this chapter, to reiterate, has been to carve out certain constraints on the constitutive question that to my mind stand apart from, and indeed should be regarded as prior to, any particular theory about what law is and how it works. Hart's account, then, may be regarded as just one among numerous other ways of undertaking the programme of legal dispositionalism, as I call it. This is why a consideration of Hart's ideas has not been my focus.
- 46 Very kindly by George Letsas, in particular.
- 47 I should point out that my discussion of this topic differs markedly from Susan Hurley's engaging treatment of some related issues in her (2006). Hurley is not here concerned with the narrower topic of counterfactuals in law, but rather with the role played by hypothetical cases in legal adjudication, more broadly speaking. As Dworkin points out in his response (2006a: 294-5, emphasis added), she is especially concerned to unpack the precise sense in which, 'The fact that "it goes without saying" that a particular hypothetical case would be decided one way or another sharply limits the eligibility of *interpretive* claims that fit actual settled cases'. In this way, Hurley's discussion is predicated on a conception of legal knowledge that I shall later go on to expound and, ultimately, reject. Still, I think the gist of her discussion is very much in keeping with my claim that we should insist on a finer-grained individuation of the descriptive facts that must be inputs for viable answers to the constitutive question.

IV

A Condition on the Problem of Legal Knowledge

17. The Linking Thesis Again

I am currently in the process of propounding a thesis that links the constitutive question with the problem of legal knowledge: the linking thesis, as I call it. That thesis is designed to offer a discrete and elaborated conception of how the metaphysics and epistemology of legal standards should stand together, and thereby furnish the content of the integration challenge for the legal domain. The linking thesis has two crucial components. The first component bears on the constitutive question, and this we examined in the previous chapter. There I argued that we should expect or anticipate the dispositions of lawyers and judges to regard certain acts or events, such as the enactment of statutes and the adjudication of cases, as having legal significance to feature heavily in any plausible answer to the constitutive question. That being said, I further insisted that those dispositions can only be partly constitutive of legal standards. Taking my cue from the broader literature on dispositions, I reached the conclusion that candidate answers to the constitutive question simply must appeal to something other than descriptive facts about what lawyers and judges are disposed to do in the course of their practice; and we have to proceed in this fashion, I suggested, for two main reasons: first, in order to capture the datum that lawyers and judges can be mistaken about the existence and content of legal requirements; secondly, in order to attain a sufficiently intelligible appreciation of what it is exactly that explains the relevance and impact of those dispositions of lawyers and judges in a constitutive explanation of legal standards. If this is right, it follows that we now have before us two conditions that constrain all plausible answers to the constitutive question—the objectivity and relevance conditions, as I call them; and in trying to establish those conditions I took my first step towards fully specifying the programme of legal dispositionalism that, to my mind, constrains any adequate solution of the integration challenge for the legal domain.

Hence we can now proceed to examine the second component of the linking thesis. As one would expect, this second component is the epistemic counterpart of the first; so, in short, it states that we should anticipate the dispositions of lawyers and

judges to be equally prominent in any credible answer to the problem of legal knowledge. The matter, however, is one of delicacy. The conclusion drawn in the previous chapter is that the aforementioned dispositions of lawyers and judges can only be partly constitutive of legal standards; on the other hand, I am now going to argue that those dispositions are wholly constitutive of what it is to know what the law requires in the instant case. To be more specific, my aim is to establish the truth of one proposition about legal knowledge—the epistemological condition, as I call it—that constrains any adequate account of its nature; which is that legal knowledge is essentially knowledge *how*: a complex set of dispositions to infer according to legal facts, rather than propositional knowledge *that* such facts obtain and why they do so. Now how can that be? How can those dispositions at once be *wholly* constitutive of legal knowledge but only *partly* constitutive of legal standards? How, one wonders, can we satisfy the objectivity, relevance, and epistemological conditions simultaneously? As we shall observe later on, the problematic is confounded here in that our two leading theories of the nature of law, the orthodox view and the model of principle, fail to negotiate those constraints satisfactorily in their respective accounts of what law is and how it works. Before getting to that, however, I need to complete my argument in support of the linking thesis by making an independent case for the epistemological condition.

18. The Problem of Legal Inference

Philosophers commonly distinguish between two kinds of knowledge—knowledge-how and knowledge-that—between the practical knowledge involved in knowing how to do something; for example, playing chess, and the propositional knowledge that some fact obtains; for instance, that the Shard is currently the 92nd tallest building in the world.¹ The question I want to ask is whether legal knowledge is best characterized as an instance of the former, the latter, or some combination of the two.

To keep matters as simple as possible, I shall focus on the elementary chain of reasoning at work in our earlier example from trusts law doctrine. Here *S* knows that Parliament has enacted the Law of Property Act 1925, which says that declarations of trusts of land must be manifested and proved by some writing; she is thereby able to draw the conclusion that Jack's oral declaration does not suffice to create a valid trust of land in English law. I will assume that it is the regular business of lawyers and judges to make these kinds of inferences. My question—the *problem of legal inference*—is how we should characterize the nature of the knowledge necessary to do precisely that.²

One possibility is that *S* is able to make such inferences because she has propositional knowledge of what the law requires in a given jurisdiction. I think that view is almost certainly false, and will argue the point in due course. In the first place, then, it will be incumbent on us to examine that *propositional conception* of legal knowledge (or ‘PC’ for short) in some detail; but let me register a final preliminary point before we do.

Start with the thought that there are indeed facts or true propositions about what the law requires in a given jurisdiction; let *p* for instance stand for the proposition that, ‘In English law declarations of trusts of land must be manifested and proved by some writing.’ It should be immediately obvious why PC is antecedently committed to such a position. The gist of PC is that *S* is able to draw her conclusion that Jack’s oral declaration does not suffice to create a valid trust of land because she has propositional knowledge that *p*. As a result, if there are no such facts or true propositions about what the law requires in the instant case, it is by no means clear on PC what legal knowledge is or could be about.

Anyone sceptical of the notion that there are facts of the matter about what the law requires in a given jurisdiction, then, would *ipso facto* have reason to reject a propositional conception of legal knowledge. But scepticism of this kind does not exhaust the range of possibilities. As we shall see in later sections, I believe there is logical space for a position holding: (1) that while there is a well-conceived metaphysical issue about how it is exactly that descriptive facts about what legislatures and courts have said and done make propositions of law true, it nevertheless remains the case (2) that PC badly misunderstands the accomplishment of someone like *S* who can infer from facts about the enactment of the Law of Property Act 1925 that Jack’s oral declaration does not suffice to create a valid trust of land in English law. (So let us have no more of scepticism in the remainder of this chapter.)

19. A Counterfactual Analysis of Knowledge?

Appreciating why first requires us to examine propositional knowledge in a little more detail. Let us assume that the classical analysis of this as *justified true belief* is along the right lines.³ In making this assumption, I do not mean to ignore Timothy Williamson’s suggestion that we put knowledge *first*, and thereby stop trying to analyse knowledge in terms of supposedly more basic notions such as belief, truth, and justification;⁴ nor am I presupposing the truth of any one particular conception of propositional knowledge;

including those which resist positing a justification condition in their analysis, such as *reliabilism*.⁵ However way we cut the pie, everyone is agreed that to have propositional knowledge that *p* is to be in a *factive* mental state—that, in other words, the term ‘knowledge’ names some characteristic relation between a mind and a fact—and this is precisely what I think is unhelpful when it comes to understanding the nature of the knowledge necessary to draw conclusions about what English law requires Jack to do with respect to his trust of land.

Let *q* stand for the proposition, then, that, ‘The Shard is currently the 92nd tallest building in the world.’ The classical analysis has it that *S* knows *q* if and only if three conditions are satisfied. Call these the *truth*, *belief*, and *justification* conditions respectively.⁶ The truth condition is motivated along the following lines. False propositions cannot be known. *S* cannot for instance know that, ‘The Shard is currently the tallest building in the world,’ since it is not; hence the condition that only true propositions can be the objects of genuine knowledge. Turning to the belief condition, if *S* does not even believe that *q*, this cannot be a proposition that *S* knows; so knowledge requires belief. The justification condition, however, is much more complicated. *S* may come to believe that *q* on grounds that do not suffice for knowledge. For instance, if *S* discerns that the Shard is currently the 92nd tallest building in the world having consulted her crystal ball or *orbuculum*, then *S* has merely got lucky here and does not know that *q*. It seems sensible, then, to insist on a third condition requiring *S* to have appropriate justification or grounds for her true belief that *q*. But including such a condition by no means rules out all epistemically problematic instances of luck.

Imagine the following scenario.⁷ *S* is driving in the countryside and sees a barn. She therefore forms the true belief that there is a barn in the field, which is appropriately justified in that her sense perception has a good track record of producing true beliefs about the existence of objects. As it turns out, *S* is driving in an area where there are many *fake barns*: expertly made papier-mâché facsimiles, which look like real barns when viewed from the road. Counterfactually, if *S* had been looking at one of them she would have been duped into believing that there is a barn in the field. In consequence, although her actual belief to that effect is justified and true, it does not suffice for knowledge: *S* has merely got lucky here; she has no grounds for ruling out the relevant alternative that what she sees in the field is not a real barn but rather a papier-mâché facsimile.

Hence the ongoing *Gettier problem* of what should be added to truth and belief in order to state conditions that are individually necessary and jointly sufficient for *S*’s

propositional knowledge that p . The issues involved in this debate are complex, and it would be impossible for me to chart the numerous attempts that have been made to analyse propositional knowledge in a way that excludes fake-barn cases and others of the sort described by Gettier.⁸ One influential line of response has been to formulate further conditions to go alongside the truth of p and S 's belief that p . This is precisely the course adopted by Robert Nozick,⁹ who argues that S 's knowledge *tracks the truth* in that it requires her to stand in a particular modal relation to p .

Indeed, Nozick gives four individually necessary and jointly sufficient conditions for a person S to know that p : (1) p is true; (2) S believes that p ; (3) If p weren't true, S wouldn't believe that p ; (4) If p were true, S would believe that p . Subjunctive condition (3) is supposed to handle fake-barn cases in the following way. Let p stand for the proposition that, 'The object in the field is a barn,' and q that, 'The object in the field is a papier-mâché facsimile.' S is driving in an area where there are many of these fake barns, so if p were false, q would be true or might be. Sense perception is S 's method or way of coming to believe M , that p ; so we can assume that she still believes via M that p , notwithstanding the prevalence of fake barns in the area. The upshot is that subjunctive condition (3) is violated. Since p is false, S shouldn't believe that p ; she does not stand in the particular modal relation to p that Nozick thinks she must in order to have propositional knowledge that p .

Such a counterfactual analysis of propositional knowledge, however, is susceptible to counterexamples. Let us suppose that there are numerous fake barns in the area, but that these papier-mâché facsimiles can only be built on certain fields with favourable soil conditions. S is unaware of the fake barns in the area, the relevant soil conditions, and why they are necessary to construct these papier-mâché facsimiles. As she is driving through the countryside and sees a real barn in the field, whose soil conditions would not in fact have supported a papier-mâché facsimile, then, she forms the true belief via M that there is a real barn in the field p . The problem is that subjunctive condition (3) is satisfied. Had there been no real barn in the field, there would not have been a papier-mâché facsimile in its place, and S would not have believed that p ; but S has merely got lucky here; she has no grounds for ruling out the relevant alternative that what she sees in the field is not a real barn but rather a papier-mâché facsimile. If this is right, it follows that her standing in Nozick's particular modal relation to p does not suffice for S 's propositional knowledge that p .¹⁰

The present point is that we should be starting to see a pattern here. To be sure, Nozick's counterfactual analysis of propositional knowledge is just one among many

other attempts to resolve the Gettier problem. But the cycle of stating individually necessary and jointly sufficient conditions for *S*'s propositional knowledge that *p* in a way that excludes fake-barn cases and others of the sort described by Gettier to only then have that analysis subjected to even more sophisticated counterexamples is a familiar one to many epistemologists.¹¹ As I mentioned, there are some who are unimpressed by all of this, and are therefore inclined to follow Williamson in holding propositional knowledge unanalysable. Thankfully, I do not have to enter this debate. As I say, for all of their differences, each of these proposals accept that propositional knowledge is a factive mental state, and are thereby supposed to improve our understanding of what it means to say that *S* knows that *p*. Given that this is precisely what I think is unhelpful when it comes to understanding the nature of the knowledge necessary to draw conclusions about what English law requires Jack to do with respect to his trust of land, we now have sufficient material: first, to explore how that idea might be extended to the legal domain; and, thereafter, to examine the shortcomings of that propositional conception of legal knowledge (or 'PC' for short).

20. The Propositional Conception of Legal Knowledge

So let us consider again our earlier example from trusts law doctrine. *S* knows that Parliament has enacted the Law of Property Act 1925, which says that declarations of trusts of land must be manifested and proved by some writing; she is thereby able to draw the conclusion that Jack's oral declaration does not suffice to create a valid trust of land in English law. Granted it is the regular business of lawyers and judges to make these kinds of inferences. Our question is how we should characterize the nature of the knowledge necessary to do precisely that.

Let *p* stand for the proposition that, 'English law requires Jack to manifest and prove his declaration of trust in writing.' The propositional conception of legal knowledge suggests that *S* knows *p* if and only if three conditions are satisfied: (1) *S* believes that *p*; (2) *p* is true; (3) *S*'s belief that *p* is appropriately justified. Conditions (1) and (2) appear unproblematic on this conception. False propositions cannot be known. *S* cannot know that oral declarations suffice to create valid trusts of land in English law, since they do not; so knowledge requires truth. Furthermore, if *S* does not even believe that *p*, this cannot be a proposition that *S* knows; so knowledge requires belief. Condition (3), then, is where the action is. *S* may come to believe that *p* on grounds that do not suffice for knowledge. For instance, given her familiarity with legal

formalities in other jurisdictions, *S* may be in a position to *guess* or *presume* that oral declarations do not suffice to create valid trusts of land in English law, but *S* has merely got lucky here; she does not know that *p*. It seems sensible, then, to insist on condition (3), which requires *S* to have appropriate justification or grounds for her belief that *p*. And yet it is by no means obvious when we are justified in holding a proposition of law to be true.

To bring this issue into sharper focus, consider the following beliefs: (1) the Queen in Parliament enacted the Law of Property Act in 1925; (2) English law requires Jack to manifest and prove his declaration of trust in writing. These beliefs are not identical. It is perfectly possible for *S* to believe (1) and, not having read the statute, not believe (2). By the same token, *S* can believe (2) for a whole host of reasons that do not imply a belief in (1). (Perhaps *S* has a deviant theory that only claimants called ‘Jack’ have to manifest and prove their declarations of trust in writing.)¹² Now consider the true proposition *p* that English law requires Jack to manifest and prove his declaration of trust in writing. In order for *S* to know that *p*, beliefs (1) and (2) should come together; for they stand in an asymmetric relation of dependence—*S* knows, when she knows, that English law requires Jack to manifest and prove his declaration of trust in writing *because* the Queen in Parliament enacted the Law of Property Act in 1925. In this way, *S*’s belief in (1) provides inferential or epistemic support for her belief in (2) and, thereby, her knowledge that *p*. But how and why is that so? How, why, and in what way does *S*’s belief that the Queen in Parliament enacted the Law of Property Act in 1925 provide an appropriate justification or ground for her belief that English law requires Jack to manifest and prove his declaration of trust in writing?

My characterization of PC will have to be somewhat speculative for at least two reasons. First, what I have in mind by PC is an organizing scheme rather than a precise doctrine. Secondly, it is difficult to characterize a view that, as far as I am aware, has no explicit adherents, and has not been argued for as a substantive position.¹³ It does not follow that our discussion is in vain. What I am trying to do here is convey a sense of the characteristic concerns and problems that would need to be addressed on this conception. To put it another way, the action at the moment is the *picture* or distinctive way of thinking about legal knowledge that emerges as soon as we try to characterize it as essentially propositional. As we shall soon observe, to understand how and why this picture reflects a significant choice of theoretical orientation is to make crucial, further progress on the nature of legal knowledge; hence I submit that we needn’t be too squeamish about being somewhat speculative in this connection.

Indeed, for present purposes, we do not have to endorse any one specific view on the structure of epistemic justification in the legal case. PC is expansive enough to include a reliabilist, counterfactual, or indeed any other take on the link in virtue of which true beliefs count as propositional knowledge of what the law requires in a given jurisdiction, so long as it means to account for how true beliefs about what legislatures and courts have said and done provide inferential or epistemic support for true beliefs about the existence and content of legal standards, and succeeds in preventing such beliefs from being ‘gettiered’.

To avoid leaving things excessively abstract, however, let us draw on our earlier discussion of Nozick’s counterfactual analysis and conceive one intuitive way, among many others to be sure, of developing the proposal that *S* is able to draw her conclusion that Jack’s oral declaration does not suffice to create a valid trust of land because she has propositional knowledge that *p*. Let *p* stand for the proposition that, ‘English law requires Jack to manifest and prove his declaration of trust in writing.’ We can assume *S* believes that *p*, and *p* is true; what the proponent of PC has yet to explain is the link in virtue of which *S*’s true belief counts as propositional knowledge that *p*.

One thing that makes Nozick’s analysis germane to this purpose is its emphasis on the ways and methods by which a person *S* comes to know that *p*.¹⁴ Suppose *S* has a cousin *C*, who also believes that English law requires Jack to manifest and prove his declaration of trust in writing. If *C* has never seen or heard of the Law of Property Act 1925, and thus forms her belief *simply* on the ground that such a requirement serves to promote certainty in legal relations, then our intuitions are that *C*’s true belief about what English law requires Jack to do with respect to his trust of land does not suffice for knowledge that *p*. On the contrary, we should rather expect *C* to form her belief on the basis of certain facts or events, such as the enactment of statutes and the adjudication of cases; in particular, that she draw her conclusion that English law requires Jack to manifest and prove his declaration of trust in writing *because* the Queen in Parliament enacted the Law of Property Act 1925, which says at section 53(1)(b) that, ‘A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.’

This is all easily accounted for on Nozick’s analysis, because after noting, as a general matter, the importance of the ways and methods by which some person *S* comes to know that *p*, he proceeds to embellish his original conditions in the following way: (1) *p* is true; (2) *S* believes, via method or way of coming to believe *M*, that *p*; (3) if *p*

weren't true and *S* were to use *M* to arrive at a belief whether (or not) *p*, then *S* wouldn't believe, via *M*, that *p*; (4) if *p* were true and *S* were to use *M* to arrive at a belief whether (or not) *p*, then *S* would believe, via *M*, that *p*.

Notice how *M* is supposed to have actual or subjunctive relevance to *S*'s true belief and indeed knowledge that *p*. The idea is not that if *M* is, inductively speaking, a more reliable way of forming beliefs about a given subject matter, then in forming her belief *p* via *M*, *S* counts as knowing that *p*. On the contrary, for Nozick, to know is to have a belief via *M* that *tracks* the truth, such that *S* knows that *p* if and only if *M* is such that *S* knows *p* via *M*. And that, I suspect, is just what we should say of the legal case. Induction does not explain why *S* should base her beliefs about the existence and content of legal requirements on descriptive facts about the enactment of statutes and the adjudication of cases. Metaphysically speaking, we are all agreed that such facts invariably *constitute* legal standards, so that *S* *has* to form her beliefs in this way in order for them to track the truth about what the law requires in the instant case. If this is right, the proposed extension of Nozick's analysis is consistent with there being characteristic ways and methods for determining the existence and content of legal standards, and it moreover promises to explain how and why *S*'s belief that the Queen in Parliament enacted the Law of Property Act in 1925 provides an appropriate justification or ground for her belief that English law requires Jack to manifest and prove his declaration of trust in writing.

21. The Argument from Testimony

All the same, PC strikes me as deeply misguided. Put the Gettier problem to one side a moment, and ignore the debate about whether Nozick's counterfactual analysis of propositional knowledge has the resources to resolve it. My attack on the propositional conception of legal knowledge does not depend on our elaborating PC along the lines suggested by Nozick. Even if we grant that PC might be elaborated in many different ways, everyone is agreed that to have propositional knowledge that *p* is to be in a factive mental state, and this is precisely what I think is unhelpful when it comes to understanding the nature of the knowledge necessary to draw conclusions about what English law requires Jack to do with respect to his trust of land.

S has propositional knowledge if and only if some characteristic link obtains between, on the one hand, her belief that *p* and, on the other hand, the fact that *p*. Nozick's thesis that *S* has such knowledge if and only if her beliefs track the truth, then,

which requires her to stand in a particular modal relation to some proposition p , suggests one intuitive way, among many others to be sure, of elaborating a propositional conception of legal knowledge. The root idea underlying such a conception is that S is able to draw her conclusion about what English law requires Jack to do with respect to his trust of land because she has propositional knowledge of what the law requires in a given jurisdiction. What I now want to do is register a fundamental point against this underlying idea.

The thrust of my criticism is that S can acquire her knowledge all too easily on PC. Indeed, I am now going to develop an *argument from testimony*, which is designed to show that even if there are legal facts to be known by S , it is not her propositional knowledge *that* such facts obtain which makes it possible for her to draw a conclusion about what English law requires Jack to do with respect to his trust of land. Quite the opposite: S can easily acquire such knowledge by relying on expert testimony, assuming it tracks the truth about what the law requires in the instant case; and yet it is obvious that S is not *thereby* able to do the sort of thing that every lawyer does and every law student learns to do. She cannot, for instance, explain why facts about the enactment of the Law of Property Act 1925 generate a concrete outcome in Jack's particular case, nor is she able to rule out those countervailing considerations that may be applicable in this connection. If this is right, it follows that to characterize legal knowledge as essentially propositional is deeply misguided.¹⁵

Imagine the following scenario. S_1 wishes to settle Blackacre upon Jill under a trust. S_1 is a layperson, ignorant of property law, and so eager to know how she should set about doing this. She therefore consults a specialist L , who has a thriving practice in property law, and duly informs S_1 what she has to do. L explains that trusts of this kind have to be made in writing. So L agrees with S_1 to meet next week and complete the relevant paperwork.

The tantalizing question here is whether S_1 thereby acquires propositional knowledge of what English law requires on this particular point. S_1 has sought out expert advice and acted on it accordingly. In so doing, she forms the belief that declarations of trusts of land must be manifested and proved by some writing. Her belief is true, since that is indeed what English law requires on this particular point. But does S_1 thereby know *that* English law requires such trusts to be made in writing? Does her belief sufficiently track the truth about what the law requires in a given jurisdiction?

One brisk way of dismissing this possibility is by advocating a pessimistic view on the general question whether we can ever acquire propositional knowledge by

relying on the testimony of others. I ask you what time it is, and you say 15:15. Do I thereby know *that* it is 15:15? You could be mistaken about what time it is, and might even be lying to me, let us suppose, because you get a kick out of making people late. Hence the ongoing debate between so-called *optimists* and *pessimists* about whether testimony is, or can be, even in principle, a source of genuine knowledge.¹⁶

The pessimist view, however, is not intuitive. Consider the legal domain. Suppose counterfactually that we were unable—in very many normal cases effortlessly, even thoughtlessly—to acquire true beliefs about what legal standards specifically require on an everyday basis (e.g. the date by which I should file my tax returns or whether I can smoke on the London Underground), and in particular obtain reliable advice from specialists on more technical issues (such as whether I can sue in private nuisance notwithstanding my lack of a proprietary interest in the relevant land). That would not be to draw attention to an accidental, superfluous, or contingent aspect of what legal standards are and how they work. It would rather be to contravene our common experience of them as for the most part intelligible and reliable guides to human conduct which enable us, for instance, to make plans, to convey property or engage in other transactions, and settle cases out of court.

So let us explore a subtler way of denying that S_1 acquires propositional knowledge of what English law requires her to do with respect to her trust of land on the basis of L 's testimony. Perhaps what we want to say here is that S_1 is in no better position than our earlier cousin C , who has never seen or heard of the Law of Property Act 1925, and thus forms her belief simply on the ground that such a requirement serves to promote certainty in legal relations. Here our intuitions are that C 's true belief about what English law requires people to do with respect to their trusts of land does not suffice for knowledge that p . On the contrary, our expectation is that C must form her belief on the basis of certain facts or events, such as the enactment of statutes and the adjudication of cases; because this is, after all, the characteristic way or method of determining the existence and content of legal standards. When S_1 forms her belief on the basis of L 's testimony, plainly she is just as ignorant as C of the Law of Property Act 1925. Her way or method of coming to know p , then, is, by hypothesis, just as much removed from the characteristic ways and methods of determining the existence and content of legal standards as is our earlier cousin C 's. Thus, so the argument goes, S_1 's belief does not sufficiently track the truth about what the law requires in a given jurisdiction.

But this is not quite right. S_1 's way or method of coming to know p tracks the truth about what English law requires on this particular point in a way that C 's does not. L knows that English law requires declarations of trusts of land to be made in writing. This is an important feature of our example. The example assumes that L has acquired her knowledge on the basis of a distinctive education and training. L is fully aware that there are certain 'sources' of English law, such as the Law of Property Act 1925, and she is able to explain why section 53(1)(b) generates a concrete outcome in S_1 's particular case. Among other things, this requires L to be aware of those other relevant authorities in this connection. L knows, for instance, that the court may entertain a post-declaration writing by S_1 to allow proof of the trust.¹⁷ In this way, L is further able to assess those countervailing considerations that may be applicable in S_1 's case. The present point is that all of this is assumed in our example. To be clear, the example is supposed to stipulate that if anybody knows what English law requires S_1 to do with respect to her trust of land, then it is L !

This is not to beg the question against PC. It is, rather, to demonstrate that when S_1 forms her belief on the basis of L 's testimony, we should accept that S_1 's method or way of coming to know p does indeed track the truth about what English law requires on this particular issue. Although S_1 herself does not satisfy our demand that her true belief that p be formed in accordance with the characteristic ways and methods of determining the existence and content of legal standards, her belief *is* based on the testimony of someone who has done precisely that.

Notice that this is decidedly not what happens in the case of C . Here C formed her belief *simply* on the abstract principle that such requirements serve to promote certain legal relations; so our intuitions are right that C has merely got lucky here, and does not know what English law requires on this given point: unlike S_1 , C has not formed her belief that p on the basis of a method that sufficiently tracks the truth about what the law requires in a given jurisdiction.

To be sure, generally speaking, our example assumes that we can acquire propositional knowledge by relying on the testimony of others. More particularly, our example assumes that this 'testimony-based' method, in want of a better term, of acquiring propositional knowledge of the existence and content of legal standards can supervene on those used by specialists such as L , which do indeed track the truth about what the law requires in a given jurisdiction. But how could it be otherwise? As I have already said, we have to accept that we can, and often do, obtain reliable advice from specialists about what the law requires in the instant case. So we have to accept that S_1

does acquire propositional knowledge of what English law requires her to do with respect to her trust of land on the basis of *L*'s testimony.

And yet it is obvious that *S*₁ is not *thereby* able to do the sort of thing that every lawyer does and every law student learns to do. She cannot, for instance, explain why facts about the enactment of the Law of Property Act 1925 generate a concrete outcome in Jack's particular case, nor is she able to rule out those countervailing considerations that may be applicable in this connection. Even if there are legal facts to be known by *S*₁, it is not her propositional knowledge *that* such facts obtain which makes it possible for her to draw a conclusion about what English law requires Jack to do with respect to his trust of land. The upshot is that PC fails to account for the truism that lawyers and judges have superior knowledge of what the law requires in a given jurisdiction. We have to look elsewhere in our enquiry into what such knowledge consists in.

22. The Dispositional Conception of Legal Knowledge

22.1 In Search of a Better Theory

The root idea underlying PC is that *S* is able to draw her conclusion about what English law requires Jack to do with respect to his trust of land because she has propositional knowledge of what the law requires in a given jurisdiction. Propositional knowledge is a factive mental state: *S* has propositional knowledge if and only if some characteristic link obtains between, on the one hand, her belief that *p* and, on the other hand, the fact that *p*. Nozick's thesis that *S* has such knowledge if and only if her beliefs track the truth, which requires her to stand in a particular modal relation to some proposition *p*, suggests one intuitive way, among many others to be sure, of elaborating a propositional conception of legal knowledge; but if the argument of the previous section is sound, the root idea underlying PC is deeply misguided.

The best way to begin in search of a better theory, I suggest, is by pinpointing what motivates a propositional conception of legal knowledge in the first place. As we have seen: everyone makes mistakes, and lawyers are no exception; judges get the law wrong, students overlook salient authorities in their examinations, and sometimes lawyers fail to spot important differences between two cases. It is vital that candidate accounts of legal knowledge respect that datum. 'Knowledge requires that we do not always get things right',¹⁸ so the very possibility of being mistaken about what the law

requires necessitates there being some logical space between our judgements of what it requires and what it in fact requires. Hence the motivation for the root idea underlying PC: it is natural to think that in any area of human activity where there is a difference between correct and incorrect practice, such as the law, there have to be facts *constituting* those standards of correctness, such that we can be mistaken about their existence and content; so the suggestion that legal knowledge consists in some characteristic link between our explicit beliefs about what the law requires and what it in fact requires is, to be sure, one elegant way of accounting for the possibility of there being mistake or error about what the law requires in a given jurisdiction. It is not the only way, however, or indeed the best way if the argument of the previous section is sound. On the contrary, PC badly misunderstands the accomplishment of someone like *S* who can infer from facts about the enactment of the Law of Property Act 1925 that Jack's oral declaration does not suffice to create a valid trust of land in English law. My misgivings, to reiterate, do not stem from any scepticism of the notion that there are indeed facts about what the law requires in a given jurisdiction. The point, rather, is that *S* can acquire her knowledge all too easily on PC.

Consequently, in this section, I should now like to address the following question: granted there is a well-conceived metaphysical issue about how it is exactly that descriptive facts about what legislatures and courts have said and done make propositions of law true; but if legal knowledge is not best characterized as an instance of propositional knowledge *that* such facts obtain and why they do so, how else should we characterize it? How, in particular, should we understand the accomplishment of someone like *S* who can infer from facts about the enactment of the Law of Property Act 1925 that Jack's oral declaration does not suffice to create a valid trust of land in English law?

I want to suggest that we do better to characterize legal knowledge as an instance of the other kind of knowledge commonly distinguished by philosophers; namely, knowledge-*how*. This is not to deny that there are indeed facts or true propositions about what the law requires in a given jurisdiction; it is rather to hold that legal knowledge essentially consists *not* in propositional knowledge *that* such facts obtain and why they do so, but rather a complex set of dispositions to infer according to them. What makes it possible for *S* to draw her conclusion about what English law requires Jack to do with respect to his trust of land, I shall be arguing, is not her having an explicit belief that tracks the truth about what the law requires in a given jurisdiction, but rather her settled disposition to infer according to legal facts. In this way, my

programme in this section is to defend a *dispositional conception* of legal knowledge (or ‘DC’ for short), and I begin by examining the concept of knowledge-how in greater detail.

22.2 *Knowing How and Knowing That*

Consider, first, Ryle’s discussion of chess.¹⁹ Garry Kasparov plays the game in a wise, skilful, and prudent manner, we can presume, whereas my playing of the game is unscrupulous, dull, and unwise. Why the difference? What exactly is known to skilful players such as Kasparov that is not known to dull players like me?

Intellectualism is Ryle’s term for the view that knowing how to do something—speaking a language, cooking a casserole, riding a bike, telling jokes, etc.—reduces to the contemplation of propositions. Continuing with our example, then, the intellectualist proposal is that knowing how to play chess is to have propositional knowledge of the rules of chess, and in particular for such knowledge to govern the actions of the players.

Ryle is famously dismissive of intellectualism. One aspect of his critique is that it generates a vicious regress,²⁰ which has received a great deal of attention in the literature on knowledge-how and knowledge-that;²¹ but for now I want to focus on his suggestion that intellectualism fails since *S* can have lots of propositional knowledge about a given activity without possessing the know-how requisite for engaging in that activity.

Consider chess again. The thought is that even if Kasparov succeeded in teaching me everything he knows about the rules and tactics of chess, it does not follow that I could play the game like him. Quite the opposite: even if I were to accept his precepts or maxims, memorize them, and be able to recite them on demand, I might still remain as unscrupulous, dull, and unwise as ever in terms of my chess playing. It is one thing, for instance, to know *that* placing my pieces in such a way as to attack the central four squares is conducive to victory. It is quite another thing for me to be capable of *actually* placing my pieces in such a way during the course of a game. If this is right, there does not seem to be any antecedent motivation for the view that skilful players such as Kasparov know certain truths or facts about chess that dull players like me do not. What distinguishes such players, it seems, is their ability to *apply* such precepts or maxims: to realize them in *practice*.

What about the Deep Blue computer developed by IBM,²² which defeated Kasparov in May 1997? Does this in any way militate against the conclusion that one

can have lots of propositional knowledge about chess and still lack the know-how requisite for playing the game? Not really, if we remember the moral of the ‘Chinese room argument’, which is owing to John Searle.²³ When I follow a computer programme for responding to certain characters, I understand nothing of chess: I do not know what pawns, bishops, and rooks are exactly; nor do I have the faintest idea of openings and gambits. It is one thing, like Deep Blue, to *mimic* or *simulate* the activity of playing chess by using syntactic rules to manipulate symbol strings. It is quite another thing, like Kasparov, to be *actually* playing the game.

Anti-intellectualism is Ryle’s positive proposal, then. The basic idea is that there is an important distinction to be drawn, on the one hand, between knowing that such-and-such is the case and, on the other hand, knowing how to do something. Whereas the former consists in the discovery of facts or truths, the latter consists in practical abilities to engage in certain forms of activity. Knowing how to do something, on this conception, is not a matter of coming to know facts or truths *about* that activity. What anti-intellectualism holds is that knowing how to do something entails having the ability to *do* it.

The distinction between these two kinds of knowledge, however, is a matter of some controversy. Many philosophers are unconvinced that we should draw an analytic distinction between knowledge-how and knowledge-that. In large part, this is because we can easily construct counterexamples against the thesis that knowing how to do something entails having an ability to do it. Consider an expert pianist who has lost her arms in a tragic accident. Her misfortune means that she no longer has the ability to play the piano as once she did. But surely, her physical incapacity notwithstanding, we should be prepared to say that she knows how to play the piano.²⁴

In light of this controversy, let me emphasize the following point. I do not want to take a stand here on whether there is an analytic distinction to be drawn between knowledge-how and knowledge-that. To be sure, I think the distinction is tolerably clear, and would certainly argue against the proposal that the former ultimately *reduces* to the latter; but I have no need to press this point in the present chapter. The example of the unfortunate pianist is Stanley and Williamson’s, and their thesis that knowing how to do something is a species of propositional knowledge has been highly influential.²⁵ All the same, *even Stanley and Williamson* insist on some cleavage between knowing how to do something and knowing that such-and-such is the case. To be more specific, they suggest that we distinguish between knowing a proposition under a *practical* and *theoretical* mode of presentation respectively; and, from what I can tell, the difference

between the two depends on whether *S* possesses the complex set of dispositions constitutive of knowing how to do something.²⁶ If, for instance, I know the proposition that, ‘Placing one’s pieces so as to attack the central four squares is conducive to victory in a game of chess,’ but am not disposed to place my pieces in such a way during the course of a game, then I know that proposition under a theoretical but not a practical mode of presentation. As a result, even if I am wrong that the distinction between knowledge-how and knowledge-that is tolerably clear, such that any dispositional conception of legal knowledge turns out to be a species of propositional knowledge after all, we can all agree that it is propositional knowledge of a very different kind.²⁷

22.3 *Explicit Beliefs vs Dispositions to Infer*

So let us run with the idea that dispositions rather than abilities hold the key to unpacking what is involved in knowing how to do something. How might we develop this idea in working towards a dispositional conception of legal knowledge?

To my mind, Paul Boghossian’s discussion in ‘Knowledge of Logic’ provides a congenial framework for doing precisely that.²⁸ Here Boghossian considers the general question of what knowing a logical rule consists in, and he is particularly interested in what justifies us in supposing *modus ponens* (MPP)—if *p*, then *q*, *p*, therefore *q*—to be a valid rule of inference. What I especially like about Boghossian’s approach is his distinction between our *explicit beliefs* that MPP is necessarily truth-preserving, and our *dispositions* to reason or infer according to MPP. To make this distinction clearer, when *S* is disposed to infer *q* when she believes that *p* and that ‘if *p*, then *q*’, Boghossian says that *S* is disposed to reason or infer according to MPP; but in addition to this disposition to infer or reason thus, *S* may also have an explicit belief about the logical facts in virtue of which MPP is necessarily truth-preserving. As Boghossian points out, these are distinct kinds of state: whereas the latter is factive, the former is not; whereas the latter involves knowing such-and-such is the case, the former involve the dispositions constitutive of knowing how to do something.

For present purposes, I do not have to assess the merits of Boghossian’s proposal that our knowledge of MPP is best characterized as a disposition to infer according to it, rather than an explicit belief about its logical status; what matters here is the distinction between these kinds of state. This is because the core claim of DC is that we ought to observe a similar distinction in the legal domain. What I am committed to

showing is that legal knowledge is essentially a complex set of dispositions to infer according to legal facts, rather than propositional knowledge that such facts obtain and why they do so.

22.4 Type-2 Dispositions and the Crux of DC

Let me begin by indicating the type of dispositions that are in play on DC.

To that end, consider our earlier example from trusts law doctrine. *S* knows that Parliament has enacted the Law of Property Act 1925, which says that declarations of trusts of land must be manifested and proved by some writing; she is thereby able to draw the conclusion that Jack's oral declaration does not suffice to create a valid trust of land in English law. Granted it is the regular business of lawyers and judges to make these kinds of inferences. Our question—the problem of legal inference—is how we should characterize the nature of the knowledge necessary to do precisely that.

On DC, when *S* judges that Jack's oral declaration does not suffice to create a valid trust of land in English law, she displays or manifests a *type-2* disposition to infer or reason according to that fact.

In principle, we can distinguish between type-1 and type-2 dispositions along the following lines. As we saw in the previous chapter, the former speak to the constitutive question, whereas the latter speak to the problem of legal knowledge. To reiterate, type-1 dispositions are the ones that lawyers and judges have for regarding certain acts or events, such as the enactment of statutes and the adjudication of cases, as having legal significance. By contrast, type-2 dispositions are the ones that lawyers and judges have for concrete outcomes in particular cases. Continuing with our example, then, the thought is that it is one thing, presumably, for *S* to be disposed, say, to regard statutes emanating from the Westminster Parliament in the UK as constitutive of rights and duties in English law. It is quite another thing for her to be disposed to draw the conclusion that English law requires Jack to manifest and prove his declaration of trust in writing.

As I see it, however, the relationship between type-1 and type-2 dispositions is much more complicated than that. The thought is best expressed in set-theoretic terms. Let *D* be the set of all the dispositions that lawyers and judges have in a given jurisdiction at a given time. Let *A* and *B* respectively denote their type-1 and type-2 dispositions. Sets *A* and *B* are not equal, for they do not have precisely the same elements, but are rather proper subsets of *D*. This is because it is perfectly possible for *S*

to be disposed to regard the Law of Property Act 1925 as a source of English law, and yet not be disposed to deem Jack's oral declaration insufficient for creating a valid trust of land. Such cases, however, are atypical or pathological. In the ordinary course of things, type-1 and type-2 dispositions are interdependent; and this is because we do not regard certain instances of political history as sources of law unless and until we are prepared to constrain our judgements in accordance with them when determining what the law requires in the instant case. The upshot is that the focus of our enquiry should be on the intersection of sets *A* and *B*, not their union. To be sure, the distinction between type-1 and type-2 dispositions is a helpful expedient for delineating, respectively, dispositionalist approaches to the constitutive question and the problem of legal knowledge; but, in view of their interdependence, no violence is done if we continue to speak of these dispositions as individuals of the same species.

It is important to bear this point in mind as we proceed. DC does not endorse the reductive claim that *what it is* for English law to require Jack to manifest and prove his declaration of trust in writing is for the bulk of lawyers and judges in this jurisdiction to be disposed to infer or reason thus. More specifically, the proposal is not a version of *conceptual role semantics*, according to which those dispositions are supposed to fix the content of legal standards, and thereby furnish criteria licensing this or that inference about what English law requires Jack to do with respect to his trust of land.²⁹ Constitutively speaking, as we have seen, descriptive facts about type-1 dispositions do indeed have a role to play in explaining what makes it the case that the law requires what it does. To repeat, however, I accept that such facts about what lawyers and judges are disposed to do in the course of their practice are only part of the story. Remember: the nerve of the objectivity and relevance conditions, as I have stated them, is that we have to appeal to something other than type-1 dispositions in viable answers to the constitutive question. Be apprised, then, that DC complete with its appeal to type-2 dispositions is an epistemological thesis that bears on the problem of legal knowledge; one which does not alter our previous conclusions on the constitutive question.

The upshot is that we can all agree that the *fact* that English law requires Jack to manifest and prove his declaration of trust in writing calls the shots: that it determines *if* and *when* someone like *S* is disposed to infer or reason according to what the law requires in the instant case. That fact, in other words, sets the standard that guides correct judgement about what the law requires on a particular issue.

Yet this is by no means an end to the matter. Where DC digs in its heels, more specifically, is in its insistence that *what S* knows *when* she knows that English law

requires Jack to manifest and prove his declaration of trust in writing cannot consist essentially in an explicit belief about the status of that fact. What makes it possible for *S* to draw her conclusion about what English law requires Jack to do with respect to his trust of land, rather, is her type-2 disposition to infer or reason according to that fact.

DC eschews any appeal to ‘rational intuitionism’ and its ilk.³⁰ Its central claim is not that lawyers somehow just ‘see’ what the law requires on this or that point, or that they have a ‘nose for arguments’ which can only be understood in primitive terms.³¹ Quite the opposite: the claim is supposed to be informative. DC appeals to dispositions with a view to constraining accounts of what legal knowledge is or consists in, exactly. And, again, modal concepts are crucial here. To say that lawyers and judges have type-2 dispositions to infer or reason according to legal facts is not merely to report facts about their actual or observable behaviour. It is, by contrast, to report a rather more complex set of dispositional facts about how they *would* infer or *would have* reasoned in advising their clients or adjudicating matters that come before them in their official capacity. Having those dispositions—no more, no less—is what DC counts as knowing the law.

This is not to deny that someone like *S* may *also* have an explicit belief about the facts in virtue of which English law requires Jack to manifest and prove his declaration of trust in writing. DC insists, however, that the obtaining of such beliefs, and indeed whether they track the truth about what the law requires in a given jurisdiction, is *neither necessary nor sufficient* for knowing what the law requires in the instant case.

The argument from testimony shows why having such beliefs is not sufficient: *S* can easily acquire such knowledge by relying on expert testimony, assuming it tracks the truth about what the law requires in the instant case; and yet it is obvious that *S* is not thereby able to do the sort of thing that every lawyer does and every law student learns to do.

Recall our earlier specialist *L*, who has a thriving practice in property law. *L* knows that English law requires declarations of trusts of land to be made in writing. *L* has acquired her knowledge on the basis of a distinctive education and training. *L* is fully aware that there are certain ‘sources’ of English law, such as the Law of Property Act 1925, and she is able to explain why section 53(1)(b) generates a concrete outcome in the instant case. Among other things, this requires *L* to be aware of those other relevant authorities in this connection. *L* knows, for instance, that the court may entertain a post-declaration writing by settlors to allow proof of trusts of land. In this

way, *L* is further able to assess those countervailing considerations that may be applicable in the instant case.

If anybody knows what English law requires people to do with respect to their trusts of land, then, it is *L*. Why so? What exactly is known to lawyers and judges like *L* that is not known to laypersons? What distinguishes *L*, on DC, is a complex set of dispositions to infer according to legal facts. You cannot acquire these dispositions—to constrain one’s judgements in accordance with certain sources of law, to make inferences about what they require in the instant case, to assess countervailing considerations etc.—through testimony, or by listening to experts describe their own practice, or even by reading an exceptionally good textbook.³² This is because acquiring those dispositions is not a matter simply of having extra pieces of propositional knowledge. On the contrary, those dispositions constitute skills that need to be learnt and practised; and what DC holds is that having these dispositions is *what it is* to know what the law requires on a particular issue. It is one thing, more specifically, to know *that* English law requires Jack to manifest and prove his declaration of trust in writing. It is quite another thing, to be sure, for me to be capable of *actually* inferring this requirement on the basis of certain facts or events, such as the Law of Property Act 1925. *The latter is what counts*. There is, therefore, no antecedent motivation for the view that lawyers and judges like *L* know certain truths or facts about the law that laypersons do not. What distinguishes *L*, it seems, is her disposition to infer according to legal facts. Having an explicit belief that tracks the truth about the facts in virtue of which English law requires Jack to manifest and prove his declaration of trust in writing, then, is insufficient for knowing what the law requires in the instant case.

It does not follow, of course, that having such beliefs is not a *necessary* condition for legal knowledge. Thus, the question arises: can one know the law without an explicit belief that tracks the truth about what the law requires in a given jurisdiction?

Here we do well to return to an earlier topic. As we have seen, counterfactuals have a life in the law. Modal considerations abound in legal disputes, which often makes counterfactual thinking an essential component of determining what the law requires on a particular issue. I have already had occasion to argue that this provides one incentive for a finer-grained individuation of the descriptive facts that must be inputs for viable answers to the constitutive question. Yet the topic of counterfactuals in law further connects with the problem of legal knowledge and, I daresay, the tenability of DC.

Consider *Causation in the Law*. In that book, Hart and Honoré defend a *pluralist* thesis.³³ Their view is that there is a difference in kind between the causal questions addressed by courts, on the one hand, and those taken up by scientists and philosophers, on the other. ‘John Doe dropped the cigarette. The house burned down. It would not have burned down *but for* that event. So Doe’s action caused the fire. And John Roe is entitled to damages.’ Lawyers and judges are, it seems, perfectly able to make such judgements about what could and might have been. In fact, when it comes to determining what the *law* deems a cause of damage, lawyers and judges manage to converge in judgements on a very large number of cases, and it is a platitude that those judgements are superior to that of laypersons. ‘The cause of the fire was the presence of oxygen.’ True enough. But that was not the kind of causal question addressed by the courts in this case. That is the *general* kind of causal question that speaks to the true metaphysics of causation. As such, it calls for scientific or philosophical speculation, inasmuch as these may be considered apart. Surely, there is no prior reason for thinking that the courts have this kind of expertise. On the contrary, as Hart and Honoré see it, the more *particular* kind of causal questions addressed by courts is one governed by the principles of common sense.

Michael Moore defends a different view. ‘Cause’, for Moore, is a univocal notion: singularist and physicalist. He is perfectly explicit that facts about the true metaphysics of causation guide our thoughts about what the law deems the cause of some action or event. As he writes at the start of *Causation and Responsibility*, ‘The central idea that organizes the book is that causation as a prerequisite to legal liability is intimately related to causation as a natural relation lying at the heart of scientific explanation.’³⁴

However that may be, the point is that there are epistemological considerations that count in favour of the pluralism defended by Hart and Honoré. Lawyers are not metaphysicians. Lawyers are not scientists. Lawyers do not theorize. Instead, lawyers practise. They study torts and crimes by reading statutes and cases, not treatises by Hume and Mill. Thus, even if we agree with Moore that there is, ultimately, no difference in kind between causal thinking in the law and deep thought about what causation really is, there is absolutely no reason for thinking that lawyers and judges are experts in this latter type of enquiry.

So here’s the puzzle. Lawyers and judges do, after all, have superior knowledge of what the law requires in a given jurisdiction. This entails that they have greater capacity to handle the modal considerations that abound in legal disputes. It follows that

they are, therefore, better at determining what the law deems the cause of some action or event as a prerequisite to legal liability. But how and why is that so? By hypothesis, such knowledge is not essentially a matter of being acquainted with facts about the true metaphysics of causation. So how else should we characterize it? More generally, how should we understand the kind of counterfactual thinking that has a life in the law?

One of the main things DC has going for it is that it provides a natural resolution of this difficulty. In fact, the problem disappears the moment we abandon the thought that legal knowledge is essentially propositional. Propositional knowledge is the kind of knowledge that results from *theorizing*: knowledge of true propositions or facts. Hence, it is precisely the type of knowledge that we want to resist attributing to lawyers and judges as they set about determining what the law requires on a particular issue. DC suggests a creative way of doing just that. We leave the metaphysical questions open. We take no view, say, on the place of causation in the law and, in particular, whether facts about the ‘true nature of the beast’ (to use Moore’s irresistible phrase) ground our ascriptions of legal liability.³⁵ Instead, we hold that even if there are such facts to be known by lawyers and judges, their superior knowledge of the law does not *consist in* their having explicit beliefs about the status of those facts.

Legal knowledge is better modelled as a kind of knowing how. Lawyers and judges have a practical ability to reach the right outcomes in particular cases; this much we should all agree. And that knowledge, I suggest, consists in lawyers and judges having type-2 dispositions to infer or reason according to legal facts. They do not, as Ryle would say, ‘do a bit of theory and then do a bit of practice’³⁶ i.e. first acquire some beliefs that are appropriately sensitive to the facts about what the law requires in a given jurisdiction, and *then* apply them in those matters to be determined in their official capacity. On the contrary, the moral to be drawn from our discussion of counterfactuals and causation in the law is that it is straightforwardly false to hold that lawyers and judges have such knowledge, if the current consensus is to be believed that facts about the true metaphysics of causation do indeed guide our thoughts about what the law deems the cause of some action or event. That is a counterfactual we cannot live with. Thankfully, we do not have to if we accept DC. If not metaphysically, then at least epistemologically speaking Hart and Honoré were on to something in suggesting that lawyers and judges are experts in dealing with causal questions at a lower level of abstraction. And this, I believe, is something of general importance that we have to capture. We have, somehow, to account for the possibility that lawyers and judges are able to reach the right outcomes in particular cases *despite* their lack of familiarity, say,

with the theoretical considerations that may or may not impinge on causation as a prerequisite to legal liability, whether the *cy-près* doctrine applies in the law of trusts, and whether this or that merger is anti-competitive for the purposes of EU competition law. DC shows how we can do that. We capture the possibility by attributing to lawyers and judges, not some explicit beliefs about the status of legal facts, but rather type-2 dispositions to infer or reason according to them. Furthermore, we insist that having those dispositions—no more, no less—is what counts as knowing the law. Of course, much more would need to be said about how lawyers and judges acquire those dispositions, and what it is exactly that is supposed to link them up in a systematic fashion with the facts in virtue of which the law requires what it does. (To be sure, I shall touch on this issue in the next section.) But, for now, the indications are clear enough. Having an explicit belief that tracks the truth about what the law requires in a given jurisdiction is not only *insufficient* for legal knowledge, but also *unnecessary*.

22.5 Resisting Synthesis and the Connection with Moral Understanding

‘Law is a realm of obligation and duty. It may require us to fight wars, to refrain from assault, to pay taxes, to keep agreements, to take care, to report crimes, to protect the environment, and to take its judgments as binding and final.’³⁷ Doubtless this is something that any conception of legal knowledge should reflect; for whatever else such knowledge consists in, it is knowledge with a normative content or object: knowledge about the rights, obligations, privileges, powers, and permissions that obtain in a given jurisdiction at a given time.

This much, I take it, is something law shares with morality: both, after all, are a source of practical reasons; such that our knowledge in either domain, if we have any, is essentially concerned with what we ought and are permitted to do. As we shall see in Chapter V, whether legal standards *are* moral standards of a particular sort is a matter of some controversy, so I do not mean to prejudge that issue here. Our focus, at this stage, is on the conditions, if any, that constrain adequate answers to the problem of legal knowledge. So my present point is that we can all agree that any viable account of legal knowledge should be able to explain, in principle, how it resembles moral knowledge in *form* if not in content.

Hence I should now like to amplify my discussion of DC by indicating its relevance and potential fruit when it comes to addressing some central questions of moral epistemology. To put it better, I want to show how and why DC connects with an

enviable perspective on the question of what it is to know what morality requires of us in a given set of circumstances. In this way, the plan is to outline the conception of moral knowledge to which, as I see it, any viable account of legal knowledge should be analogized.

Is moral knowledge propositional? Is it the kind of knowledge that one has when one knows that such-and-such is the case? Take promising. Assuming one knows that one ought to keep one's promises, in what does such knowledge consist? How is it best characterized?

Let us assume the following background metaphysics of moral reasons.³⁸ Moral reasons are normative reasons. Normative reasons are facts. The fact that you promised to read my paper constitutes a *normative* reason for you to do so, in that the fact of your having promised counts in favour of your reading my paper. That fact is also an *explanatory* reason if and when it is a consideration in the light of which you act. In any case, your normative reason to read my paper is *pro-tanto* rather than absolute. If your son has got the measles today, then you do not have to read my paper; although you should get around to telling me at some point.

Moral rights and duties are normative reasons with a particular stringency. The fact that you promised to read my paper trumps the circumstance that you cannot be bothered to read it today. That fact is a reason in virtue of some moral principle or value. To be sure, we can disagree about what that principle or value is, exactly. But let the principle drawn attention to by Scanlon in *What We Owe to Each Other* serve as a placeholder.³⁹ We wrong people when we lead them to form expectations that we intend to frustrate. That principle explains how and why the fact of your having promised justifies the conclusion that you ought to read my paper. The principle about wrongdoing makes it right that you do so.

Let us suppose that you read my paper, and that the fact of your having promised to do so is the consideration in light of which you act. Philosophers are inclined to say that here you have 'responded' to a reason that applies to you, and for the most part that is expedient. In and of itself, however, the phrase qualifies over various sources of difficulty. What, more precisely, does it mean to say that some agent has responded to a consideration that counts in favour of her performing a given action? Continuing with our example, how should we unpack your response to the fact that you promised to read my paper?

One thing, certainly, that we are concerned to do here is individuate your action as one of a particular type. Your reading my paper is an *intentional* action on your part.

Your heartbeats, hiccups, digestion, coughing, and sneezing, by contrast, are all involuntary actions of yours. Responding to a reason is not like this. When we respond to reasons, we are non-accidentally related and deliberately sensitive to aspects of the world that make our actions the things to do. Hence the possibility of our being mistaken about reasons that apply to us. When you refuse to read my paper because you cannot be bothered today, either you are unaware of the relevant facts, or you do not respond to them in the right way. The fact that you promised to read my paper makes it right that you do so.

At any rate, I assume that, for the most part, we are able to conduct ourselves in the light of reasons that apply to us, such that there is a pressing epistemic question to raise about how we should understand that capacity. For we have to distinguish between accidental and deliberately sensitive responses to reasons. And if we can be mistaken about those reasons, then it follows that we can have knowledge of them. So the difficulty lies in this. How should we understand the nature of the knowledge, if any, that makes it possible for us to respond to reasons? Assuming one knows that one ought to keep one's promises, in what does such knowledge consist? How is it best characterized?

It would be fair to say that slight attention has been paid to this question in ethical theory. There has been a mass of writing on the *metaphysical* question about what normative reasons are exactly. By contrast, the epistemological question in this connection, in particular the question whether our knowledge of such reasons is essentially *propositional*, merits further scrutiny.⁴⁰

The work of Alison Hills in this area, then, is all the more an important and welcome exception; for Hills has taken up in earnest the question whether moral knowledge is essentially propositional, and in so doing expounded the conception of moral knowledge to which, give or take a few premises, as I see it, any viable account of legal knowledge should be analogized.⁴¹

The starting point of her account is a puzzle about moral testimony. Should we form our moral beliefs on the say-so of others? Do we *thereby* acquire knowledge of reasons that apply to us? An affirmative answer suggests there are moral experts, but that is a contentious idea to say the very least.⁴² Testimony, let us assume, is a genuine source of our knowledge of the world. We are, after all, reliant on what others tell us. My car refused to start this morning. I do not know why. The mechanic tells me that there is something wrong with the carburettor. I trust what he says, and pay him to fix it. So far, so good. But how about this. There is a referendum on the reinstatement of

capital punishment. Joe Bloggs gives me a spiel on *lex talionis*. I trust what he says, form the belief that we should bring back the rope, and vote accordingly. The point is that there is something awry when we form our moral beliefs on the testimony of others. Although, by hypothesis, this is perfectly fine concerning non-moral matters of fact, our intuitions are that there are no moral experts on reasons that apply to us. But why the difference? Why is testimony ruled out as a source of moral knowledge? Assuming there are facts about what we owe to each other, why resist the very idea of moral expertise?

The answer proposed by Hills is that moral beliefs take moral *understanding* rather than moral *knowledge* as their constitutive aim. There is a difference between simply knowing *that* capital punishment is wrong, *p*, and grasping the reasons *why* that proposition holds, *q*. The latter is the mark of moral understanding, and this doesn't come cheap. On the contrary, as Hills explains, if you understand why *p*, then you are, *inter alia*, able to: '(i) follow an explanation of why *p* given by someone else; (ii) explain why *p* in your own words; (iii) draw the conclusion that *p* (or that probably *p*) from the information that *q*.'⁴³

Moral understanding connects with the puzzle about moral testimony, then, in a deceptively simple way. The basic idea is that even if there are facts about what we owe to each other, because our beliefs here aim at something over and above mere knowledge *that* those facts obtain, we do wrong to form our moral beliefs on the say-so of others. Moral beliefs aim at moral understanding, not merely moral knowledge. You cannot, by hypothesis, acquire moral understanding through testimony. This is because when you form moral beliefs on the say-so of others, you do not *thereby* acquire abilities (i)-(iii), which according to Hills are precisely what is involved in grasping the underlying reasons why *p* holds. Notice how, in consequence, the debate about moral expertise is all but sidestepped. Even if there are moral experts, after all, it does not follow that we should form our moral beliefs by relying on their testimony.

In what does moral understanding consist, then? Is it, more specifically, the kind of knowledge that one has when one knows that such-and-such is the case? Or is it, rather, a matter of having the dispositions constitutive of knowing how to do something? '*Both*' is the answer one gleans from Hill's account. On the one hand, she is perfectly explicit that moral understanding is a 'factive' propositional attitude, which is to say that moral understanding names some characteristic relation between a mind and a fact.⁴⁴ On the other hand, Hill's discussion is uniquely germane to my purposes, since

she further emphasizes that moral understanding has ‘interesting similarities with knowing how’.⁴⁵ Consider the following passage:

To understand why *p*, you have to have the abilities (i) to (vi), to at least some extent. Of course, you can have these abilities to a greater or lesser degree, which may make it tempting to say that moral understanding comes in degrees...

You can know why *p* without having these abilities—that is one reason why understanding why *p* is not the same as knowing why *p*. But it may be tempting to think that having the abilities is simply to have extra pieces of knowledge...

But I think that having these abilities is not the same as having extra pieces of knowledge. Gaining this extra knowledge may help you acquire the requisite abilities, but you might have the extra pieces of knowledge without having the kind of good judgement that enables you to generate new true moral beliefs yourself. Surely no extra piece or pieces of knowledge guarantee that you have these abilities. In order to have moral understanding you must have the internal grasp of the relationship between *p* and the reasons why *p*, and this does not seem to be a piece of propositional knowledge.⁴⁶

Armed with this overview of moral understanding, we are now in a position to draw the analogies, and indeed disanalogies, between Hill’s account and DC as I have presented it hitherto. I start with the analogies. Both views are motivated with arguments from testimony. I believe that legal knowledge comes too cheaply if we can acquire it through expert testimony, and Hills argues that we do not acquire moral understanding by relying on the say-so of others. The upshot is that dispositions are central on both accounts. I hold, more specifically, that knowing the law is a matter of having type-2 dispositions to infer according to legal facts, whereas Hills argues that the abilities constitutive of moral understanding are not extra pieces of propositional knowledge, but must rather be thought of in dispositional terms. Both accounts, thereby, eschew any appeal to rational intuitionism and its ilk. Our respective claims are not that we somehow just ‘see’ what the law requires on this or that point, or what morality requires of us here and now. On the contrary, the point of our appealing to dispositions in law and morality is to give an account of *what it is* to have knowledge in these respective domains.

Here the analogies cease, however. Moral understanding is factive. Although dispositions are central to moral understanding, it is a propositional attitude none the

less. Perhaps we can put Hill's thought this way. On her view, having an explicit belief that tracks the truth about what morality requires of us in a given set of circumstances, moral knowledge as she calls it, is merely a *necessary* condition for moral understanding. This is because you do not understand *why* morality requires this or that, specifically, unless and until you have the dispositions (i)-(vi) mentioned above; and that, to be sure, is the *sufficient* condition for moral understanding. What Hills has in mind here, then, is an engaging synthesis: a conception of moral epistemology, in other words, whereby propositional and dispositional knowledge, knowing how and knowing that, stand in a relation of interdependence.

This is something I have tried to resist in the legal case. Remember, on DC, legal knowledge should not be conceived as a propositional attitude *at all*. DC is not, along the lines suggested by Hills, a propositional knowledge-*plus* account, by which I mean the idea that such knowledge about the existence and content of legal standards is merely a necessary and not a sufficient condition for knowledge of what the law requires in the instant case. On the contrary, I have argued that having an explicit belief that tracks the truth about the facts in virtue of which, say, English law requires Jack to manifest and prove his declaration of trust in writing is not only insufficient, but *also* unnecessary for knowledge of what the law requires on this particular issue. In this way, I have been eager to resist the kind of synthesis suggested by Hills.

It bears emphasizing that my misgivings apply just as much to morality as they do to law. What I do not see is why having propositional knowledge of moral requirements is a *necessary* condition for responding to reasons that apply to us. Consider again the example of your promising to read my paper. You know, let us assume, that 'One ought to keep one's promises.' Does it follow that we should attribute to you theoretical knowledge of the underlying reasons that make that proposition true? Hill's account entails that we should, because your moral understanding, your ability to respond to reasons that apply to you, *consists in* your 'internal grasp of the relationship between *p* and the reasons why *p*'.⁴⁷ But this seems too demanding. In just the same way that we have to resist the conclusion that lawyers and judges are experts on the true metaphysics of causation, we need to reject the notion that morally worthy action is mediated by moral theorizing. You may never have read Scanlon, say, or thought much, if at all, about what *makes it the case* that one ought to keep one's promises. Epistemologically speaking, however, you understand perfectly well what promising requires of you here, which is why you adjust your behaviour accordingly. This, I believe, is something of general importance that we have to capture. We have,

somehow, to account for the possibility that moral agents are perfectly able to respond to reasons *despite* their lack of familiarity, say, with the theoretical considerations that may or may not impinge on how and why the fact of their promising generates a duty to conform. DC shows how we can do that. We capture the possibility by attributing to agents, not some explicit beliefs about the status of moral facts, but rather settled dispositions to infer or reason according to them. Furthermore, we insist that having those dispositions—no more, no less—is what is involved in responding to reasons that apply to us. Of course, much more would need to be said about how agents acquire those dispositions, and what it is exactly that is supposed to link them up in a systematic fashion with the facts in virtue of which morality requires what it does. But, for now, the indications are clear enough. Having an explicit belief that tracks the truth about what morality demands is not only insufficient for moral knowledge, but also unnecessary.

To sum this up, doubtless any viable account of legal knowledge should be able to explain, in principle, how it resembles moral knowledge in form if not in content. This is why I have sought to amplify my discussion of DC by examining the conception of moral knowledge to which, as I see it, any viable account of legal knowledge should be analogized. There are important connections between Hill's account and my own. But there are significant disanalogies too. The point of our appealing to dispositions in law and morality is to give an account of what it is to have knowledge in these respective domains. Yet we should resist a propositional knowledge-plus account on both counts. Having an explicit belief that tracks the truth about what the law requires in a given jurisdiction is not only insufficient for legal knowledge, but also unnecessary. And I daresay the same applies to moral knowledge too.

23. Objections and Refinements

Before we conclude this chapter, it is advisable to consider some ways in which the crux of DC may be contested.

(a) The first objection I have in mind is this. 'DC holds that having type-2 dispositions to infer or reason according to legal facts is wholly constitutive of what it is to know what the law requires in the instant case. But what are we to make of cases such as *Donoghue v Stevenson*,⁴⁸ which is widely agreed to have heralded the introduction of negligence as a cause of action in English law?⁴⁹ The most natural conclusion to draw about 'landmark' cases of this kind is that the law may contain a

certain requirement, even though the bulk of lawyers and judges in a given jurisdiction are not disposed to infer or reason according to it. Take Lord Atkin's judgement about the 'neighbourhood principle'.⁵⁰ The judgement depends for its intelligibility on the background assumption that plaintiffs have legal rights to redress that guide and constrain the judgements of the courts, quite independently of their settled dispositions to infer or reason in one way or another. The upshot is that it would seem that judges can and often do 'buck the trend', i.e. make judgements that are out of step with the settled dispositions of other lawyers and judges in a given jurisdiction to infer or reason according to legal facts. Now suppose Lord Atkin was right about the neighbourhood principle. (We could disagree about that, but no matter because we can readily envisage other examples.) The point is that Lord Atkin has knowledge of the law that his peers do not. It is by no means clear how this can be explained in dispositional terms, however. What we should say here is that Lord Atkin's knowledge consists in his having a belief that tracks the truth about what the law requires in the instant case *notwithstanding* the prevailing type-2 dispositions of other lawyers and judges in a given jurisdiction. So how can DC hold that having those dispositions is wholly constitutive of what it is to know what the law requires on a particular issue?'

I want to respond to (a) along the following lines. (a) raises an engaging question about how mistake or error about what the law requires in a given jurisdiction is so much as possible on DC. As I see it, however, mistake or error about the existence and content of legal standards is easily accommodated on our dispositional conception of legal knowledge. It is of first-rate importance to notice from the start that DC is not the legal analogue of certain superficially similar proposals that find adherents in the philosophy of language and mind. I have already emphasized that DC is neither a type of rational intuitionism nor a version of conceptual role semantics. (For good measure, let me state quite plainly that DC should not be conceived as a neo-Wittgensteinian criterial theory.⁵¹) Thus, my central claim is not that lawyers somehow just 'see' what the law requires on this or that point, or that their type-2 dispositions fix the content of legal standards and, thereby, furnish criteria licensing this or that inference, say, about what English law requires Jack to do with respect to his trust of land. As I have said, DC leaves untouched our earlier findings on the constitutive question; so it proceeds on the assumption that the *fact* that English law requires Jack to manifest and prove his declaration of trust in writing calls the shots: that it determines *if* and *when* someone like *S* is disposed to infer or reason according to what the law requires in the instant case. The conditional character of DC, then, is crucial. It enjoins that lawyers and judges

may very well be disposed to infer or reason in accordance with legal facts, but then again they may not. Hence the possibility of there being mistake or error about the existence and content of legal standards is easily accommodated on DC.

The way all of this is supposed to handle the putative counterexample of *Donoghue* is really quite simple. If we agree that Lord Atkin was right about the neighbourhood principle, then my interlocutor is quite correct in suggesting that his Lordship has knowledge of the law notwithstanding the prevailing type-2 dispositions of other lawyers and judges in a given jurisdiction. It does not follow, however, that this knowledge is essentially propositional, such that landmark cases of this kind present a problem for DC more generally speaking. To begin with, there is a very trivial sense in which Lord Atkin *is* disposed to infer or reason according to legal facts. What we would say, more precisely, on DC is that, in judging as he did, his Lordship manifested or displayed a type-2 disposition to infer or reason in accordance with the facts in virtue of which the plaintiff had a legal right to win in *Donoghue*. Remember, modal concepts are crucial here: to ascribe that disposition to Lord Atkin is not merely to report facts about his actual or observable behaviour. It is, by contrast, to report a rather more complex set of dispositional facts about how he *would* infer or *would have* reasoned in adjudicating such matters that come before him in his official capacity. In consequence, it is no objection to the present proposal that his Lordship is dealing with a fact situation that has yet to arise in the course of his practice.

Ergo the adherent of DC has a perfectly natural way of explaining what is going on in landmark cases of this kind. What we should say here is that whereas Lord Atkin satisfies the crucial conditional in play on DC, his peers do not. The fact that the plaintiff has a legal right to win in *Donoghue* calls the shots: it determines if and when lawyers and judges are disposed to infer or reason according to what the law requires in the instant case. As a result, lawyers and judges like Lord Atkin may very well be disposed to infer or reason in accordance with legal facts, but then again others may not. The possibility of there being mistake or error about the existence and content of legal standards is easily accommodated on DC, and landmark cases present precious little difficulties for it.

Indeed, where I think (a) goes awry is in its supposition that DC covertly depends on the truth of some *conventionalist* thesis, if not generally speaking then at least in the legal case. If, more specifically, DC assumed either as a conceptual matter or in substantive terms that lawyers and judges do or must align their practice with that of their peers, then landmark cases would present the kind of difficulties canvassed in (a).

Yet DC has absolutely nothing to do with the prospects of legal conventionalism. Some philosophers, to be sure, have tried to develop coherent versions of this prominent approach to certain questions of general jurisprudence. Be apprised, however, that this discussion would perforce amount to an *explanans* for addressing the integration challenge for the legal domain. In stark contrast, DC is supposed to bring into sharper focus certain aspects of the *explanandum* presented by that challenge. Here, more specifically, we are trying to establish the truth of one abstract proposition about legal knowledge that constrains any adequate account of its nature; which is that such knowledge is, essentially, a kind of knowing how. Hence, my interlocutor would have to do more than simply gesture towards landmark cases with a view to refuting DC. The relevant question is whether I have done enough to establish that having an explicit belief that tracks the truth about what the law requires in a given jurisdiction is not only insufficient for legal knowledge, but also unnecessary. That claim may be askew or erroneous for all sorts of reasons. Covertly assuming the truth of legal conventionalism, however, is certainly not one of them.

(b) But this leaves my interlocutor unsatisfied. He continues thus. ‘Your response to (a) is *ad hoc*, which is indicative of a broader problem with DC as you have presented it thus far. DC holds that having an explicit belief that tracks the truth about what the law requires in a given jurisdiction is not a necessary condition for knowledge of what the law requires in the instant case. On this view, having settled dispositions to infer or reason according to legal facts—no more, no less—is what counts as knowing the law. We can all agree that those type-2 dispositions, as you call them, do not come cheaply, but rather constitute skills that need to be learnt and practised. We can also agree that modal concepts are crucial to our understanding of those dispositions; because we would not say that lawyers and judges have acquired those dispositions unless and until they are prepared to manifest or display them in counterfactual circumstances that have yet to arise in their practice. We may also agree, for the sake of argument, that legal knowledge does not result from theorizing but, instead, should be modelled as a kind of knowing how as you suggest. All the same, the point is that there is a missing piece in the jigsaw.

You propose to handle landmark cases, and the datum of mistake, more generally, by emphasizing the conditional character of DC. More specifically, you hold that judges like Lord Atkin in *Donoghue* are disposed to infer or reason according to legal facts *if* and *when* they manifest or display those dispositions in the course of their practice. This strategy is *ad hoc* because there has as yet been no explanation of what it

is, exactly, that is supposed to link those dispositions up in a systematic fashion with the facts in virtue of which the law requires this or that in some particular case. *How* do lawyers and judges like Lord Atkin acquire their type-2 dispositions? *Why* are those dispositions ‘in accordance with’ (to use your phrase) the *facts* about what the law requires in a given jurisdiction? *What* is it, more precisely, that establishes the connection between the two? Until these are specified, the worry is that legal knowledge comes out accidental on DC. As Hilary Putnam might say, the ‘no miracles’ argument here is that DC threatens to make legal knowledge both opaque and inexplicable.⁵² Now, you want to hold that DC has absolutely nothing to do with the prospects of legal conventionalism. OK. But without something of that kind on the table, there is even less of an indication of how, why, and in what way type-2 dispositions are supposed to dovetail with the facts in virtue of which the law requires what it does. This is not, it seems, a difficulty shared by adherents of the propositional conception of legal knowledge. So that, to be sure, is a consideration that counts against DC.’

I have two things to say in response to (b). We can encapsulate (b) as the complaint that there is no principle linking type-2 dispositions with legal facts on DC. Although this is quite correct, to my mind (b) generates no difficulties for the argument of the foregoing sections.

In the first place, it is by no means clear that this demand for a ‘linking principle’,⁵³ so to speak, can be easily satisfied (as my interlocutor assumes it can) on the propositional conception of legal knowledge. On the contrary, taking a leaf out of Wittgenstein,⁵⁴ Ryle,⁵⁵ and Lewis Carroll⁵⁶ we can readily envisage a vicious regress confronting any adherent of PC. To illustrate, suppose I have an explicit belief that in English law declarations of trusts of land must be manifested and proved by some writing. Now suppose that I am due to determine whether Jack’s oral declaration suffices to create a valid trust of land. The proposition that his declaration is insufficient for this purpose (*q*) is not identical with the proposition that in English law declarations of trusts of land must be manifested and proved by some writing (*p*). ($\therefore p \neq q$). So there must be some principle linking both my explicit belief that *p* and the true proposition *q* if and when I know the law. A natural thought might be this. We distinguish between general propositions about the existence and content of legal standards, and particular propositions about what the law requires in the instant case: generalizations imply their instances, after all. If and when I know the law, then, what I am able to do is apply these general propositions to particular cases ($p \rightarrow q, p \vdash q$). But so begins the regress. A familiar problem arises from *modus ponens* deductions of this

kind. For a prior principle is needed to explain or ground the application of that rule of inference in any one particular case.⁵⁷ Once that principle is grounded, another is required. And so on *ad infinitum*.

I have presented this regress briefly, i.e. without argument, because it forms no part of my negative case against PC. In this regard, my strategy has rather been to draw attention to why having explicit beliefs about what the law requires in a given jurisdiction is neither necessary nor sufficient for knowledge of what the law requires in the instant case; and I have no need to rehearse the arguments offered above in support of that central claim. The point of drawing attention to the regress is merely to indicate that it is by no means clear that the demand for the kind of linking principle canvassed in (b) can easily be satisfied by adherents of the propositional conception of legal knowledge. Explaining how it is exactly that our explicit beliefs about the existence and content of legal standards provide inferential support for discrete conclusions about what the law requires in a given jurisdiction is, it seems, just as pressing an issue as that of how, why, and in what way type-2 dispositions are supposed to dovetail with the facts in virtue of which the law requires what it does. In consequence, the conspicuous absence of such a linking principle on DC does not in and of itself constitute an argument against the dispositional conception of legal knowledge.

Quite the opposite: as it turns out, and this is the second problem with (b), the complaint that there is no principle linking type-2 dispositions with legal facts on DC misunderstands the dialectic of the present chapter. DC is not supposed to provide a full account of what legal knowledge is exactly. By contrast, it constitutes support for one abstract proposition about legal knowledge that constrains any adequate account of its nature. Again our undertaking has been modest, to be sure, but as ever far from trivial. As we shall presently observe in the next chapter, providing just the kind of linking principle canvassed in (b) enjoins that we square a plausible answer to the constitutive question with a conception of legal knowledge that conceives it as a kind of knowing how. This is exceedingly difficult. Our two leading theories of the nature of law, I shall be arguing, are unable to do so. Only then shall we be informed as to the kind of legal theory that promises to furnish the resources necessary to meet the integration challenge for the legal domain. In any case, the bottom line is that although the demand for a linking principle as canvassed in (b) is perfectly legitimate, now is not the time and place to provide it.

24. The Epistemological Condition

The integration challenge for the legal domain is to provide a simultaneously acceptable answer to the constitutive question and the problem of legal knowledge: it demands that we reconcile a plausible account of what makes it the case that the law requires what it does with a credible account of what it is to know what the law requires on a particular issue. The present chapter has focussed exclusively on the latter of these questions. Accordingly, in this final section, my aim is to review our progress and indicate how the foregoing arguments advance our understanding of that broader challenge of reconciling truth and knowledge in law.

The problem of legal knowledge is as simple as it is profound. It seems clear that lawyers and judges have superior knowledge of what the law requires in a given jurisdiction. But in what does such knowledge consist? What do you know when you know the law? This is a question about the nature of legal knowledge as such; knowledge which by hypothesis is common to all lawyers in different jurisdictions, and may therefore in principle be studied fruitfully independently of the particular content of the doctrines enforced in this or that legal system. We cannot answer this question by spouting platitudes about what it means to ‘think like a lawyer’. First and foremost, it requires us to take a stand on whether legal knowledge is best characterized as an instance of knowledge-how, knowledge-that, or some combination of the two. And, in a nutshell, that is what I have tried to do in the foregoing sections.

I should be clear that this is only part of what is involved in providing an account of the nature of legal knowledge. The question whether legal knowledge is essentially an instance of knowledge-how, as I have suggested, however, is fundamental in this connection. Above all, what I want the reader to take away from this chapter is an appreciation of how whether we go one way or the other reflects a significant choice of theoretical orientation. To start with the thought, for instance, that legal knowledge is essentially propositional is to give one’s account of such knowledge a very particular cast; hence we cannot arrive at a full account of what legal knowledge is or consists in unless and until we take a stand on whether so doing is the way to go.

To make this task manageable, I have focussed my attention on an elementary example from trusts law doctrine. *S* knows that Parliament has enacted the Law of Property Act 1925, which says that declarations of trusts of land must be manifested and proved by some writing; she is thereby able to draw the conclusion that Jack’s oral declaration does not suffice to create a valid trust of land in English law. No doubt it

would be more tantalizing to launch into enquiries about, say, what *S* knows *when* she knows that the UK's involvement in Iraq was contrary to international law; but we cannot put the cart before the horse. The elementary chain of reasoning at work in our example is the very stuff of what every lawyer does and every law student learns to do; namely, to draw conclusions about the existence and content of legal standards from descriptive facts about what legislatures and courts have said and done. The problem of legal knowledge is just as much a problem in ostensibly 'cut and dry' cases such as these; thus my focus on them in the present chapter.

One possibility is that *S* is able to make such inferences because she has propositional knowledge of what the law requires in a given jurisdiction. Therein lies the core claim of what I called the propositional conception of legal knowledge or PC for short. In retrospect one gets the impression that I may have overdone my exposition of the Gettier problem, and the debate about whether Nozick's counterfactual analysis of propositional knowledge has the resources to resolve it; but I do not think this discussion was in vain. Should a theorist wish to run with the idea that legal knowledge is essentially propositional, these are just the kind of issues that she would need to address, if not generally speaking, then at least as applied to the legal case. Given my aims in this chapter, it was important for me to outline what a propositional conception of legal knowledge might look like. That, to be sure, was the point of my speculating how Nozick's analysis might play out in the legal domain.

In any case, my attack on the propositional conception of legal knowledge does not depend on our elaborating PC along the lines suggested by Nozick. Even if we grant that PC might be elaborated in many different ways, everyone is agreed that to have propositional knowledge that *p* is to be in a factive mental state, and it is precisely this root idea that I think is unhelpful when it comes to understanding the nature of the knowledge necessary to draw conclusions about what English law requires Jack to do with respect to his trust of land.

The thrust of my criticism is that *S* can acquire her knowledge all too easily on PC. What the argument from testimony was designed to show is that even if there are legal facts to be known by *S*, it is not her propositional knowledge *that* such facts obtain which makes it possible for her to draw a conclusion about what English law requires Jack to do with respect to his trust of land. Quite the opposite: *S* can easily acquire such knowledge by relying on expert testimony, assuming it tracks the truth about what the law requires in the instant case; and yet it is obvious that *S* is not *thereby* able to do the sort of thing that every lawyer does and every law student learns to do. She cannot, for

instance, explain why facts about the enactment of the Law of Property Act 1925 generate a concrete outcome in Jack's particular case, nor is she able to rule out those countervailing considerations that may be applicable in this connection. To characterize legal knowledge as essentially propositional, then, is deeply misguided.

By contrast, the dispositional conception of legal knowledge, or DC for short, suffers from no such difficulties. The basic idea is that in order to do the sort of thing that every lawyer does and every law student learns to do, you need to have certain dispositions. You cannot acquire these dispositions through testimony, or by listening to lawyers and judges describe their own practice, or even by reading an exceptionally good textbook. In short, these dispositions constitute skills that need to be learnt and practised; what makes it possible for *S* to draw her conclusion about what English law requires Jack to do with respect to his trust of land is not her having an explicit belief that tracks the truth about what the law requires in a given jurisdiction, but rather her settled disposition to infer according to legal facts.

The way all of this is supposed to advance our understanding of the integration challenge for the legal domain is best summed up in the following terms. That legal knowledge is essentially dispositional constrains any adequate account of its nature. Having observed that the challenge of providing a simultaneously acceptable metaphysics and epistemology of legal standards needs to be addressed in general jurisprudence, then, we should expect or anticipate that candidate answers to the constitutive question be consistent with this fact. That *epistemological condition*, as I call it, insists that we proceed on the footing that their having type-2 dispositions to infer or reason according to legal facts is wholly constitutive of the superior knowledge of lawyers and judges of what the law requires in a given jurisdiction. On the other hand, as we have seen, the objectivity and relevance conditions entail that their having type-1 dispositions to regard certain acts or events such as the enactment of statutes and the adjudication of cases as having legal significance can only be partly constitutive of legal standards. Type-1 and type-2 dispositions, to be sure, are individuals of the same species. So it seems that we are being pulled in opposite directions. How can these dispositions at once be *wholly* constitutive of legal knowledge but only *partly* constitutive of legal standards? How, one wonders, can we satisfy the objectivity, relevance, and epistemological conditions simultaneously? To square this circle is to embark on what I have called the programme of legal dispositionalism that guides and constrains any adequate approach to the integration challenge for the legal domain. Armed with just this concrete set of desiderata or adequacy conditions, we now have the

criteria necessary to test how two leading theories of the nature of law fare with respect to our challenge, and therefore be informed as to how we should try to do better.

Notes to Chapter IV

- 1 See the articles in Bengson and Moffett (2012).
- 2 I am here using ‘inference’ in an ordinary, non-technical way. My question, throughout, will be what it is to draw the conclusion that the law requires something or other on a given point, i.e. to make judgements about the existence and content of legal standards. As a result, nothing in what follows turns on the general semantics and pragmatics of conditionals, so I forgo any consideration of these topics. For more on these issues, see the articles collected in Jackson (1991).
- 3 See, in particular, Plato’s *Theaetetus* (210a) and *Meno* (98) in Cooper (1997). See too Ayer (1956: 34).
- 4 Williamson (2000). See too Hossack (2007).
- 5 See Bergmann (2004); Kornblith (2004); Steup (2004).
- 6 See further Dancy (1985: 23-33).
- 7 The scenario draws on Goldman (1976).
- 8 Gettier (1963).
- 9 Nozick (1981: 167 ff.).
- 10 See further Kripke (2011: 165-77).
- 11 See Zagzebski (1994).
- 12 Recall the sceptic in Kripke (1982).
- 13 To be sure, Michael S Pardo has explored the relevance of the Gettier problem to judgements of *fact* in the law of evidence, but that is very different from the general problem of what it is to know the *law*, which is of course the object of the present enquiry. See Pardo (2010).
- 14 Nozick (1981: 179-85). See too Kripke (2011: 204-8).
- 15 There are interesting parallels between this argument and the one developed by Alison Hills in her (2010: 169-233) concerning moral testimony. But I have no need to explore the connections here. My argument in no way depends on her thesis that we should not base our moral beliefs on the testimony of others, and that we should therefore regard those beliefs as having *moral understanding* rather than *moral knowledge* as their constitutive aim. I shall, however, establish helpful connections between this view and the dispositional conception of legal knowledge that is discussed in the next section.
- 16 I borrow these terms from Hills (2009: 94). For helpful discussion, see Faulkner (2011).

- 17 See *Gardner v Rowe* (1828) 5 Russ. 258.
- 18 Pavlakos (2007: 15).
- 19 Ryle (1945: 5-6).
- 20 Ryle (2000: 31): ‘The crucial objection to the intellectualist legend is this. The consideration of propositions is itself an operation the execution of which can be more or less intelligent, more or less stupid. But if, for any operation to be intelligently executed, a prior theoretical operation had first to be performed and performed intelligently, it would be a logical impossibility for anyone ever to break into the circle.’
- 21 See Fantl (2012).
- 22 See Feng-Hsiung Hsu (2002). Many thanks to Alex Green for making me aware of the example.
- 23 Searle (1980).
- 24 The example is Stanley and Williamson's (2001: 416).
- 25 For further discussion of this idea, see Stanley (2011).
- 26 See Stanley and Williamson (2001: 430).
- 27 Hills (2010: 197) makes a similar point concerning moral understanding.
- 28 Boghossian (2000).
- 29 For helpful discussion of this approach, see Greenberg and Harman (2006).
- 30 I have borrowed this term from Boghossian (2000: 234). John Rawls's (1999: 30) discussion of what he calls ‘intuitionism’ conveys a sense of how this notion might play out in the legal case: ‘we are simply to strike a balance by intuition, by what seems to us most nearly right. Or if there are priority rules, these are thought to be more or less trivial and of no substantial assistance in reaching a judgment’.
- 31 The phrase is Ryle's (2000: 26) though not the suggestion that legal knowledge is a primitive notion.
- 32 My phrasing here draws on Hills (2010: 216).
- 33 Hart and Honoré (1985: 9-13). The thesis may better be labelled ‘exceptionalist’ rather than pluralist. This is because it is hard to discern whether Hart and Honoré take causal notions in the law to be *sui generis*, or rather more particular notions that generate their own special problems. In large part, this is owing to the ‘ordinary-language’ analysis of causal concepts deployed by Hart and Honoré, both in the legal case, and more generally speaking. For helpful discussion of this difficulty of interpretation, with

- especial reference to the doctrine of *novus actus interveniens*, see MS Moore (2009: 254-60).
- 34 MS Moore (2009: vii).
- 35 *ibid*, 327.
- 36 Ryle (2000: 30).
- 37 Green (2002: 514).
- 38 The background metaphysics in the text draws eclectically on Dancy (2002); Parfit (2011: 31-42); Raz (2011); Scanlon (1998: 17-78).
- 39 Scanlon (1998: 295-327).
- 40 I am aware of the extensive literature on *epistemic* reasons or reasons for *belief*, the gist of which is well represented in Reisner and Steglich-Petersen (2011). But I have not seen my question addressed therein.
- 41 Hills (2010: Part III).
- 42 As Bernard Williams (1995: 205) puts the point: ‘There are, notoriously, no ethical experts...Anyone who is tempted to take up the idea of there being a theoretical science of ethics should be discouraged by reflecting on what would be involved in taking seriously the idea that there were experts in it. It would imply, for instance, that a student who had not followed the professor’s reasoning but had understood his moral conclusion might have some reason, on the strength of his professorial authority, to accept it...These Platonic implications are presumably not accepted by anyone.’
- 43 Hills (2010: 194, *emphasis added*).
- 44 *ibid*, 190.
- 45 *ibid*, 196.
- 46 *ibid*, 195-6 (*emphasis added*).
- 47 *ibid*, 196 (*emphasis added*).
- 48 [1932] AC 562.
- 49 See further Chapman (2009).
- 50 [1932] AC 562, 578-601.
- 51 For helpful discussion, see Hacker (1993: 243-67).
- 52 Putnam (1975a); (2012).

- 53 The term is Boghossian's (2000: 249-51), and I am here indebted to his discussion.
- 54 Wittgenstein (1967: §202).
- 55 Ryle (2000: 31).
- 56 Carroll (1895).
- 57 See further Quine (1976).

V

Two Views of the Nature of Law

25. The Not So Negative Project

The previous chapters have sought to introduce an integration challenge for the legal domain, and to establish three conditions that constrain adequate solutions of this pressing theoretical problem. The object of the present chapter, then, is to deepen our understanding of that challenge; in particular, by assessing how our two leading theories of the nature of law fare with respect to our problematic. To the left, as it were, stands the *orthodox view*, by which I mean that version of legal positivism powerfully developed by Joseph Raz. To the right, by contrast, stands the *model of principle*, which is of course most closely associated with the work of Ronald Dworkin.¹

My conclusion will be essentially negative; for I shall argue that both the orthodox view and the model of principle fail to meet the integration challenge for the legal domain. Yet there is a more positive message that will emerge from this discussion. The gist of my remarks is going to be that whereas the model of principle is broadly correct in its approach to the constitutive question, the orthodox view furnishes a more promising route to solving the problem of legal knowledge. I shall therefore be at pains throughout to demonstrate why we have to reconcile these insights, and in so doing provide a platform for a superior solution to the integration challenge that forms our concern. Just such a solution I hope to develop in forthcoming work. For the here and now, however, let me explain why, in their present form at least, neither the orthodox view nor the model of principle provides a simultaneously acceptable metaphysics and epistemology of legal standards.

26. The Orthodox View and the Model of Principle

The integration challenge for the legal domain is to provide a simultaneously acceptable answer to the constitutive question and the problem of legal knowledge: how, if at all, can we reconcile a plausible account of what makes it the case that the law requires what it does with a credible account of what it is to know what the law requires on a

particular issue? I have argued that candidate solutions of this challenge have two key hurdles to surmount: one is to answer the constitutive question in a way that satisfies the objectivity and relevance conditions; the other hurdle is to explain how such an account of truth in law squares with a credible view of the nature of legal knowledge and thereby meets the epistemological condition.

Let me start therefore by presenting in greater detail the orthodox view on the constitutive question. As is well known, Raz concentrates his account on the proposition that law necessarily claims legitimate authority, and his answer to the constitutive question turns on two crucial conditions that he argues law must meet in order for that proposition to be true. To flesh this out, Raz proposes for consideration a certain version of legal positivism which we may conveniently label the *sources thesis*;² and the sources thesis has it that the existence and content of legal standards are constitutively determined by an interrelated set of norms; that is to say, *rules* which mandate or permit some action. On this view, legal rules come into existence when *de facto* political authorities, paradigmatically legislatures and courts, issue directives or instructions, which stipulate what their subjects are required to do in specified circumstances. This is essentially an act of communication, because when legislatures and courts issue directives in the form of enacted statutes and decided cases, they are said to assume the privileged position of legitimate practical authorities concerning what their subjects ought to do. Now, legitimate practical authorities have a normative power to impose duties on their subjects by simply communicating an intention to do so. Thus, we truly submit our action to the judgements of practical authorities only when we regard their directives as creating new reasons that pre-empt and exclude at least some of the considerations that may or may not count in favour of the actions prescribed by the directives in question. Raz does not, of course, hold that law necessarily *has* legitimate authority to direct its subjects in this way. His thought, rather, is that law necessarily *claims* legitimate authority; such that two conditions must be met by law if it is to make good on its claim legitimately to direct its subjects by simply communicating an intention to do so. Indeed it must be possible, Raz argues, for law to mediate between its subjects and their reasons. More precisely, it must be possible: (1) for legal standards to represent the judgements of *de facto* political authorities, such as legislatures and courts, on what their subjects ought to do; (2) it must be possible to identify the existence and content of these directives without recourse to the underlying reasons or considerations that these directives purport to settle. On the orthodox view, only the sources thesis is suitably placed to meet these conditions.

Let us turn our attention now to the model of principle. To avoid confusion, the position I have in mind is often referred to as an ‘interpretivist’ theory of law—the kind most closely associated with the work of Ronald Dworkin.³ As I shall be using the term, however, the model of principle is sufficiently flexible to incorporate the significant developments of this position, which have been offered by Mark Greenberg and Nicos Stavropoulos; although I shall not be concerned to draw attention to these in what follows, nor pursue the exegetical question of the extent to which the model of principle deviates from Dworkin’s texts: I am simply concerned to present Dworkin’s position in what I consider to be its strongest terms, and argue thereafter that it nevertheless fails to meet the integration challenge for the legal domain.⁴

On the model of principle, substantive considerations of political morality have a pivotal role to play in any satisfactory answer to the constitutive question. It rejects the orthodox view that legal standards are exclusively constituted by descriptive facts about the existence and content of an interrelated set of rules: negatively, the claim is that this fails to provide an intelligible explanation of how, why, and in what way legal rights and duties obtain in virtue of more basic descriptive facts about the sayings and doings of political institutions; positively, the claim is that we can best circumvent this problem by enriching the constituents of legal standards with certain moral principles that determine the legal relevance and impact of enacted statutes and decided cases on what we ought to do.

The basic idea is that certain moral principles make it the case that the law requires what it does.⁵ This is not merely a thesis about how judges should decide hard cases. The claim is *not* that enacted statutes and decided cases, understood in descriptive terms, exhaust the settled law in a given jurisdiction but which nevertheless have to be supplemented with moral considerations so as to fill gaps in the law or filter out those provisions considered to be inconsistent with our moral convictions. The claim, rather, is that principles feature among the *constituents* or *determinants* of legal rights and duties and, in that sense, have a more fundamental role to play. What principles do, more specifically, is constitutively explain the legal relevance of past political practice: they identify what it is exactly about enacted statutes and decided cases that generates the legal rights and duties that obtain in a given jurisdiction—how, why, and in what way these descriptive facts about what political institutions have said and done have the legal consequences that they do.

Consider the standard example of *Riggs v Palmer*.⁶ *E* murders *G* in order to obtain possession of property, which he is due to inherit under a properly executed will.

Although the explicit content of enacted statutes and decided cases suggests that *E* may inherit the property, notwithstanding his murdering *G* in order to do so, the majority holds otherwise. The court observes that the merit of *E*'s claim is governed by the principle that no man may profit from his own wrong, and it concludes that *E* should be disinherited accordingly. How, then, is this example supposed to advance the case for the model of principle? The thought is that the legal effect of this principle about wrongdoing cannot be explained by its having been explicitly laid down, endorsed, or otherwise authorized in sources of law; for not only did the court identify a contrary precedent in the shape of *Owens v Owens*,⁷ but we can identify numerous other instances in the law where people do, it seems, profit from their own wrongdoing: consider adverse possession and efficient breaches of contracts, to use Dworkin's own examples.⁸ The legal effect of the principle, then, must be explained in a different way. But if the principle, and indeed its impact on the proceedings, cannot be explained on the model of rules or norms articulated by proponents of the orthodox view, how then should we explain it?

The conclusion that we are encouraged to reach is that the principle functions as a requirement of justice, fairness, or some other dimension of morality; and that its impact on the proceedings is best explained in the following way. What the principle does is provide normative support for the truth of discrete propositions of law; for instance, that 'an heir named in a properly valid will cannot inherit when he murders the testator to obtain immediate possession of the property'. The principle thus serves as an element or premise in a broader substantive argument concerning what it is exactly about enacted statutes and decided cases, such as the New York Statute of Wills or the decision in *Owens*, that generates *E*'s legal rights and duties—how, why, and in what way these descriptive facts about what political institutions have said and done make it the case that he should be disinherited. It is precisely in this sense, then, that principles are supposed to feature among the constituents or determinates of legal rights and duties, and thereby make it the case that the law requires what it does.

27. Hercules and the Subsumption Thesis

The foregoing overview of the perspectives suggested respectively by the orthodox view and the model of principle on the constitutive question stands in need of development, and to be sure will be further elaborated as we proceed. For present purposes, however, I want to lay greater stress in my exposition on what these

competing accounts ‘entail’ for the problem of legal knowledge, and we now have sufficient material to do that.

I put entail in scare quotes for the following reason. The problem of what it is to know the law, in many ways, is a new problem for general jurisprudence. Certainly, many authors have articulated what the orthodox view and the model of principle entail for the nature of legal reasoning or the implication question,⁹ but as we observed in the second chapter of this essay that is not quite the same thing. This is all a long way of saying that I shall be pursuing a creative project in this section. I shall be trying, more specifically, to tease out what our two leading answers to the constitutive question imply as regards the nature of legal knowledge and how that is best characterized. So, to be clear, what follows is of a philosophical rather than exegetical cast.

To begin with the orthodox view, recall Raz’s insistence that two crucial conditions have to be met if law is to mediate between its subjects and their reasons, and so make good on its claim to legitimate authority. I suggest that these conditions are precisely where the action is when it comes to assessing the implications of the orthodox view for the constitutive elements of our knowledge of what the law requires in a given jurisdiction. The conditions state that it must be possible for legal standards to represent the judgements of *de facto* political authorities, such as legislatures and courts, on what their subjects ought to do; and it must be possible to identify the existence and content of these directives without recourse to the underlying reasons or considerations that these directives purport to settle.

Raz has it that this sources thesis captures ‘a fundamental insight into the function of law’.¹⁰ We do not want to live in a state of nature. The natural condition of mankind is characterized by moral problems whose solutions are capricious, contentious, and arbitrary.¹¹ We need a system of publicly ascertainable standards so as to coordinate our action towards shared goals and projects. In short, modern societies are marked by their need for an authoritative system of rules—that is to say, a legal system—which claims the right to direct its subjects by simply communicating an intention to do so. To discharge that function, a legal system will need rules of at least two kinds.¹² There will, in the first place, need to be rules that confer rights, impose duties, and thereby guide the conduct of people. In the second place, there will need to be rules identifying by whose agency and how the former type of rules may be changed, modified, and developed. Both types of rules, however, must be *legally valid*. It must be possible, in other words, to identify those rules as belonging to the legal system in question. There must, more specifically, be ways and means of identifying the existence

and content of those rules without recourse to the underlying reasons or considerations that those rules purport to settle. The fundamental idea behind the sources thesis is that any theory of the nature of law is acceptable only if it explains and satisfies this constraint.

To a first approximation, then, the orthodox view is committed to showing that legal knowledge essentially consists in first attributing directives to legislatures and courts, and then ascertaining the content of those practical judgements about how we ought to behave. Consider our earlier example from trusts law doctrine. Parliament has enacted the Law of Property Act 1925, which says that declarations of trusts of land must be manifested and proved by some writing. The orthodox view is that those descriptive facts of language and political history constitute a rule or norm, to which legal rights and duties owe their existence and content. Hence, inasmuch as lawyers and judges have superior knowledge of what the law requires in a given jurisdiction, at a minimum, this consists in their being able to identify rules as legally valid. So far so good, one might suspect. As Raz suggests, ‘To establish the content of the statute, all one need do is to establish that the enactment took place, and what it says. To do this one needs little more than knowledge of English (including technical legal English), and of the events which took place in Parliament on a few occasions.’¹³

The issue is a little more complicated than that, however. Facts about the enactment and language of the Law of Property Act 1925 constitute a rule of general application, not an isolated command reserved for Jack’s case. True, the statute explicitly says that oral declarations do not suffice to create valid trusts of land in English law. Yet the statute makes no mention of Jack: it only establishes implicitly what the law requires Jack to do with respect to his trust of land. The upshot is that lawyers and judges must, on the orthodox view, be able to subsume the facts of Jack’s case under a general rule constituted by the enactment and language of the Law of Property Act 1925. More generally, on what I shall call the *subsumption thesis*, given its answer to the constitutive question, the orthodox view entails that legal knowledge essentially consists in first identifying general rules as legally valid, and then applying those rules to particular cases.

It bears emphasizing that this task is often difficult and sometimes impossible, on the orthodox view. Subsuming particular cases under general rules is frequently difficult because novel fact situations emerge (should the court, for instance, entertain a post-declaration writing by Jack to allow proof of the trust?);¹⁴ rules have exceptions, after all; and sometimes rules from different areas of law may interact in complex ways

(as they do, for example, in the case of equitable compensation for breach of fiduciary duty).¹⁵ Furthermore, there will always be those pathological cases where the law is unsettled. We have to accept, on the orthodox view, that the law is the product of human institutions and practices; and, as such, these prevent us from planning for every eventuality. Gaps in the law are a genuine phenomenon and, so the argument goes, in such cases judges, in particular, have to exercise their political power or discretion to decide how the law should be developed. Still, the subsumption thesis does, I believe, demarcate the core of what the orthodox view entails as regards the constitutive elements of our knowledge of what the law requires in a given jurisdiction. Such a proposal is, perforce, intimately connected with controversies surrounding what it is to follow rules, exactly, and later I shall touch on this. For the moment, though, let us direct our attention to the epistemological implications of the model of principle.

Given its answer to the constitutive question, how does the model of principle speak to the problem of legal knowledge? What, if anything, does it entail when it comes to the issue of what one knows when one knows the law?

Here, I think, Judge Hercules deserves a special mention. Hercules is the superhuman judge who is afforded by Dworkin a starring role in *Law's Empire*.¹⁶ Now when Hercules has to decide a case, it would be fair to say that he deploys a quite exceptional method. He begins by accepting the proposition that our concept of law picks out the discrete political value of legality, such that the fundamental point and purpose of legal practice is to guide and constrain the collective use of force in a given community. Hercules accepts, in other words, that the coercive power of government should be deployed only when it is permitted or required by the rights and duties that obtain on account of past political decisions and practice concerning when that use of force is justified. When Hercules decides a case, then, he aims to provide a 'constructive interpretation' of legal practice, which, to cut a long story short, elaborates on those abstract and provisional starting points.¹⁷ To be more specific, having begun his enquiry with the thought that legal rights and duties are those that people are properly entitled to enforce on demand in courts and other institutions, Hercules has to confront the pressing question: 'which, if any, legal rights and duties am I properly entitled to enforce in this courtroom?' So as to answer that question, what Hercules has to do is engage in substantive argument concerning the more concrete implications of the discrete political value that our concept of law picks out. 'To be sure', we can imagine Hercules saying, 'the value of legality furnishes a significant constraint on the collective use of force in a given community'. 'But what', Hercules continues to ask, 'does that

constraint demand of me in deciding the present case?’ ‘What, if any, legal rights and duties flow from or obtain on account of that discrete political value?’

I must confess to never having been quite sure as to what we should make of Judge Hercules. My worry is that I am unclear, dialectically speaking, on the precise role that this yarn about a superhuman judge is supposed to play in the central argument of *Law's Empire*. What is the point of the story about Hercules? Does it speak to the constitutive question? The problem of legal knowledge, perhaps? Both, maybe? One possibility, it seems, is that the point of the story about Hercules is purely heuristic.¹⁸ On this reading, the moral of the story is merely to model in a creative fashion what is involved in providing an adequate answer to the constitutive question; no more, no less. But I am not so sure. Dworkin is standardly read as saying,¹⁹ and I daresay there is plenty of textual evidence to suggest,²⁰ that Hercules provides a model of what lawyers and judges both take themselves to be doing and should be aiming at anyway in determining what the law requires in the instant case. Certainly, we can only but approximate the superhuman feats of Hercules on the bench. Yet I find nothing in Dworkin to suggest that the method deployed by Hercules is, in any shape or form, supposed to be different in kind from the type of argument deployed by lawyers and judges in ascertaining what the law requires on a given point. On the contrary, remember all the fuss about ‘theoretical disagreement in law’?²¹ Such disagreement, the kind in play in *Riggs*, which we have discussed above, is made possible, according to Dworkin, precisely because lawyers and judges are in the business of offering substantive arguments about what legality requires of us now. Thus, I submit, the indications are that the method of constructive interpretation deployed by Hercules speaks every bit as much to the problem of legal knowledge as it does to the constitutive question.

To be more specific, the implications here can only be radical and revisionary. The model of principle suggests that to know the law is to have propositional knowledge of how the content of an abstract theory of political obligation plays out in more concrete instances. That knowledge may very well be implicit rather than explicit, and later I shall touch on this. There can be no doubting the following, however. The model of principle entails that determining what the law requires on a particular issue is nothing less than a substantive exercise of political philosophy. When lawyers and judges determine what the law requires in the instant case, their task is to identify which beliefs are true about the substantive moral impact made by enacted statutes and decided cases on what we ought to do. Consider again our example from trusts law

doctrine. Everyone is agreed that lawyers and judges have superior knowledge when it comes to determining the sufficiency of Jack's oral declaration to create a valid trust of land in Jill's favour. But in what does such knowledge consist? Assuming the model of principle offers a satisfactory answer to the constitutive question, the implications are clear: that the superior knowledge of lawyers and judges consists in a type of *moral expertise*; it consists, as far as our example goes, in the ability to deploy certain moral principles in substantive arguments as to why the enactment of the Law of Property Act 1925, among other things, justifies the imposition of a standard that requires Jack to manifest and prove his declaration of trust in writing. So, for ease of exposition, let us say that the interpretivist project is to defend a *model of* (if not explicitly, then at least implicitly) *known principles* as far as the problem of legal knowledge is concerned.²²

28. The Objectivity Condition Again

Having outlined the perspectives suggested respectively by the orthodox view and the model of principle on the constitutive question, and having laid greater stress in my exposition on what these competing accounts entail for the problem of legal knowledge, I shall now argue for my negative thesis that both the orthodox view and the model of principle fail to meet the integration challenge for the legal domain. The challenge, in a nutshell, is to provide a simultaneously acceptable answer to the constitutive question and the problem of legal knowledge: how, if at all, can we reconcile a plausible account of what makes it the case that the law requires what it does with a credible account of what it is to know what the law requires on a particular issue? I have argued that candidate solutions of this challenge have two key hurdles to surmount: one is to answer the constitutive question in a way that satisfies the objectivity and relevance conditions; the other hurdle is to explain how such an account of truth in law squares with a credible view of the nature of legal knowledge and thereby meets the epistemological condition. Accordingly, let me now explain why, in their present form at least, the orthodox view and the model of principle fail to surmount these hurdles, and thereby provide a simultaneously acceptable metaphysics and epistemology of legal standards.

The best way to begin in this endeavour is by reviewing briefly how the objectivity condition is supposed to constrain candidate answers to the constitutive question. The objectivity condition, as was articulated in the third chapter of this essay, is the product of two thoughts; both of which are inherently plausible enough in themselves, although they pull us in opposite directions. On the one hand, if there are

facts about what the law requires in a given jurisdiction, these are decidedly unlike facts such as the existence of any particular quark, which let us assume obtain independently of any individual or community having thought about or engaged with them. This is because legal practice presents us with an area of intentional human activity where the beliefs, attitudes, and judgements of lawyers and judges do not merely track an independently constituted set of facts about the existence and content of legal requirements, but are rather partly constitutive of these. On the other hand, lest we render nonsensical the distinction between a first and a third in law exams or overlook the strongly objective standard presupposed by lawyers when they speak of judges ‘getting the law wrong’ since their decisions misrepresent settled doctrines on a particular point of law, for instance, it seems equally clear that candidate answers to the constitutive question must leave sufficient room for mistake or error about what the law requires on a particular issue. Combining those two thoughts together, then, the explanatory burden presented by the objectivity condition is one of reconciliation: wherein lies a convincing account of how it is possible for lawyers and judges to be mistaken about the existence and content of legal standards, given how their beliefs, attitudes, and judgements are partly constitutive of those facts about what the law requires in a given jurisdiction?

Here I said it is helpful to think of a continuum representing three broad options with respect to the scope of such mistake or error about the existence and content of legal requirements. At one extreme is the view that individual judgement and case necessarily coincide in the legal domain. Consider taste again, by way of illustration.²³ If there is nothing more to something’s tasting salty than its being apt to produce this experience in subjects under normal conditions, then individual judgement and case necessarily coincide here; for there is no standard governing my judgement, say, that these crisps are salty: nothing in virtue of which my judgement on this score could turn out to be mistaken. Now, I take it to be uncontroversial that we should expect a richer standard of objectivity in the legal domain. Whatever the case with taste, as our practices of marking law exams and making submissions in court suggest, for example, we should expect some logical space between how an individual judges or believes the law to be, on the one hand, and what it in fact requires, on the other. And this is something which is all but explained on the present model of secondary qualities.

Nevertheless, there is, I said, an important choice that needs to be made between two remaining, decidedly more plausible, options on our imagined continuum with respect to how we should understand that space between individual judgement and case

in the legal domain and, thus, our appreciation of the objectivity condition in the larger integration challenge that forms our concern. So let me now address these in succession.

28.1 Incomplete Understanding, Anti-Individualism, and Criteria

The first of these options is suggested by the orthodox view. *Incomplete understanding* is pivotal on this approach so, in the first place, it will be well for us to be acquainted with that notion.²⁴ A curious thing is that we can have thoughts involving a particular concept without fully grasping or having mastery of that concept. Consider Burge's example of a benighted rube who has thoughts involving the concept of arthritis, notwithstanding his belief that he has the condition in his thigh.²⁵ We have already touched on how cases of this sort are supposed to motivate an *externalist* or, as Burge dubs it, an *anti-individualist* position on mental content, according to which it is partly in virtue of their having complex relations with the environment that our thoughts involve some particular concepts.²⁶ What we now have to examine is a sophisticated version of this proposal, which has been developed by Joseph Raz with a view to making room for mistake or error about the existence and content of legal requirements.²⁷

Let us fasten our attention on another example due to Burge.²⁸ Many people, as we have seen, believe that every legally valid contract needs to be made in writing. In this they stand to be corrected; because contracts are agreements to which written documents, for the most part, bear only an evidential relation.²⁹ Suppose Tim holds that mistaken belief. This is a further case of incomplete understanding. Tim has but a slender grasp of the concept CONTRACT, and cannot determine whether it correctly applies to some agreement between *A* and *B*.³⁰ And yet, in using the concept as he does, Tim *does* presumably entertain thoughts about contracts, even though he is unaware of the relevant environmental factors, such as how contractual obligations are determined by a community of lawyers in a given jurisdiction at a given time. The difficulty, of course, is to explain how any of this is possible.

One suggestion, which is canvassed by Burge and deployed by Raz, is that there is here an implicit attempt, on Tim's part, to conform to correct usage.³¹ Our thought and talk about the world does not exist in a vacuum. Natural language, in particular, is a social phenomenon that, among other things, depends for its existence on our settled dispositions to use words in one way or another; for, as Frege writes, 'we cannot understand one another without language, and so in the end we must always rely on

other people's understanding words, inflexions, and sentence-construction in essentially the same way as ourselves'.³² Tim is not, therefore, an infallible authority on what his words mean, or what his concepts pick out. Whatever meaning or content Tim may have assigned to 'contract' and CONTRACT respectively, he *intends* to use them correctly. There is no guarantee, in so doing, that Tim will get this right.

On the contrary, on this view, having a concept *C* is essentially a matter of being responsible to standards that govern the correct extension of *C*.³³ Those standards, to be clear, are not identical with our actual usage of *C*, but rather that to which such usage is supposed to conform. Take ARTHRITIS. Burge, in particular, accepts that our settled dispositions to use ARTHRITIS in one way or another are partly determinative of whether our thoughts involve that particular concept. Indeed, perhaps the central *point* of his famous thought experiment is that if my doppelgänger finds himself in a community where ARTHRITIS was extended to cover all rheumatic conditions—such as scleroderma and Sjögren syndrome—then he would not have the concept ARTHRITIS, but some other concept, THARTHRTIS.³⁴ In any case, Burge further insists that the standard to which our actual usage of ARTHRITIS is supposed to conform does not reduce to facts about our settled dispositions to use that concept in one way or another. Far from it: much like Kripke, Burge realizes that those facts about how we are disposed to extend our concepts do not *of themselves* constitute any standard. Those dispositions are finite, descriptive, and susceptible to deviant hypotheses. As he writes, 'Our conception of mind is responsive to intellectual norms which provide the permanent possibility of challenge to any actual practices of individuals or communities that we could envisage.'³⁵

The salience of this last point is considerable because, although he does not acknowledge it, the moral that Raz intends to draw by appealing to incomplete understanding in the legal case differs markedly from Burge's conclusions about that notion, more generally speaking. The occasion for Raz's discussion is the challenge presented to the orthodox view by the prevalence of theoretical disagreement in law. The orthodox view, as we have seen, is that law is a system of rules. Dworkin argues that this relies on a *criteria model* of what determines the correct extension of legal concepts.³⁶ The basic idea is that we follow shared rules in determining what the law requires on a particular issue. For instance, if *A* and *B* are *ad idem*, then what makes their agreement a contract, what determines whether CONTRACT is correctly applied to this case, is that lawyers and judges have settled dispositions for rules that specify standards or tests by which to judge fact situations of this kind in matters that come

before them in their official capacity. The criterial model does not sit well, however, with the kind of disagreement in *Riggs*, says Dworkin. Taking ‘hard cases’ like that seriously, he believes, should lead us to an alternative conclusion about how and why the dispositions and practice of lawyers and judges in a given jurisdiction determine the correct extension of legal concepts, and thereby what the law requires on a particular issue. For although those dispositions and practice are certainly relevant, on this alternative view, they do not constitute *criteria* determining degenerate truths about what counts as a contract, say. We can sensibly argue and legitimately disagree about whether some agreement between *A* and *B* is correctly characterized as a contract. And we can be mistaken about whether CONTRACT is correctly applied to this case. The upshot, for Dworkin, is that the settled dispositions of lawyers and judges to apply that concept, one way or another, in matters that come before them in their official capacity, are merely the raw data. What determines the correct extension of CONTRACT are rather the moral principles that best fit and justify that data. Those are the standards to which our actual usage of CONTRACT is supposed to conform. The correct extension of legal concepts, on this view, then, is sensitive to substantive considerations all the way down.

The present point is that there is a more natural affinity between the account of conceptual content that we find in Burge and the *interpretivist* account of what determines the correct extension of legal concepts. As we have just observed, for Burge, having a concept *C* is essentially a matter of being responsible to standards that transcend, not only the actual usage of *C* by individuals, but also the *collective* usage of that concept. Consider the deviant hypothesis that SOFA names works of art or religious artefacts.³⁷ Much like Kripke, Burge realizes that this hypothesis is perfectly consistent with all of the facts about our settled dispositions to extend SOFA to furnishings meant to be sat on. Those dispositions, however, are finite and descriptive; and so, of themselves, they fix neither the content of SOFA, nor make it the case that our thoughts involve that particular concept. Certainly, our settled dispositions on this score are partly determinative of whether our thoughts involve SOFA. But they do not, as Burge sees it, constitute indubitable criteria determining degenerate truths about what *counts* as a sofa. That role is rather reserved for what Burge calls ‘cognitive value’, i.e. the theoretical considerations that make best sense of our extending SOFA to furnishings meant to be sat on, and establish that this ‘underlying pattern of activity *should be as it is*’.³⁸ Those are the standards to which our actual usage of SOFA is supposed to conform. Swap CONTRACT for SOFA; substitute fit and justification for cognitive value; and I daresay the parallels between Dworkin and Burge, in this regard, are plain for all to see.

This makes Raz's deployment of Burge's ideas all the more surprising. Following H.L.A. Hart,³⁹ by far the most common strategy for handling theoretical disagreement in law has been to deny that the orthodox view is, *pace* Dworkin, wedded to the criterial model of what determines the correct extension of legal concepts.⁴⁰ This is not Raz's strategy, however. He argues that we can *combine* a commitment to the criterial model with an *anti-individualist* account of conceptual content.⁴¹ In this way, the plan is to revitalize the criterial model, not only by showing how it can account for theoretical disagreement in law, but also by showing how it leaves sufficient room for mistake or error about the existence and content of legal requirements.⁴²

Take CONTRACT again. The claim is that we follow shared rules in determining what the law requires on a particular issue. Those rules, to be sure, are supposed to furnish criteria determining whether some agreement between *A* and *B* is correctly characterized as a contract. It does not follow, on Raz's view, however, that lawyers and judges have fully grasped or mastered the criteria that determine the correct application of those rules.

Quite the opposite: Raz's thought is that judgement of what the law requires in a given jurisdiction presents us with a further case of *incomplete understanding*. Such judgement is marked by an implicit attempt to conform to the shared or common criteria for the application of legal rules. This is no mean feat. Subsuming particular cases under general rules is frequently difficult because novel fact situations emerge, rules have exceptions and degrees of scope, and sometimes rules from different areas of law may interact in complex ways. This suggests that there is no antecedent motivation for the view that the criteria determining, say, whether some agreement between *A* and *B* is correctly characterized as a contract should be understood *individualistically*.

On the contrary: lawyers and judges are not, it seems, infallible authorities on the criteria determining the correct application of legal rules in matters that come before them in their official capacity. This is because whatever criteria they are disposed to apply in such cases, they *intend* to apply them correctly. And, to be sure, there is no guarantee, in so doing, that lawyers and judges will get this right. Instead, we do better to understand the relevant criteria *anti-individualistically*. On this view, having a legal concept like CONTRACT is essentially a matter of conforming to the shared criteria established by legal rules that govern the correct extension of CONTRACT. Those criteria, to be sure, are not identical with the way lawyers and judges actually use CONTRACT in a given jurisdiction, but rather that to which such usage is supposed to conform. We can sensibly argue and legitimately disagree about what that shared

understanding amounts to, exactly, in any one particular case. And, by hypothesis, the possibility of there being mistake or error about the existence and content of legal requirements is thereby easily accommodated.

The main problem with this proposal is that it does not go far enough. If we are going to be anti-individualistic about legal concepts and content, then let us be full-blown about it, not half-baked. Full-blown anti-individualism entails that having a concept is essentially a matter of being responsible to standards that transcend the collective usage of that concept. There is no place for shared rules and criteria, on this view. Concepts are rather individuated by the substantive considerations that make best sense of our extensions of those concepts, and moreover establish that this ‘underlying pattern of activity *should be as it is*’.⁴³ So, if there is any moral to be drawn from Burge’s work, in particular, it is that we should be interpretivists about legal concepts, not criterialists along the lines suggested by the orthodox view.

Let me pinpoint the problem. Consider *Donoghue v Stevenson* again, which is widely agreed to have heralded the introduction of negligence as a cause of action in English law. The most natural conclusion to draw about ‘landmark’ cases of this kind, as we have seen, is that the law may contain a certain requirement, even though the bulk of lawyers and judges in a given jurisdiction are not disposed to infer or reason according to it.⁴⁴ Take Lord Atkin’s judgement about the ‘neighbourhood principle’. The judgement depends for its intelligibility on the background assumption that plaintiffs have legal rights to redress that guide and constrain the judgements of the courts, quite independently of their settled dispositions to infer or reason in one way or another. The upshot, for present purposes, is that, on the face of it, the law may contain a certain requirement, even though a comprehensive ‘*übersehen*’ or surview (to borrow another phrase of Wittgenstein’s)⁴⁵ of the shared or common criteria for the application of legal rules entails that it does not have it.⁴⁶

It may be objected, of course, that we could explain these cases in another way, i.e. as a *decision* taken by the courts on a hitherto indeterminate or as yet legally unregulated issue.⁴⁷ But I suggest that this conclusion is unsatisfactory in two respects. First, it effectively surrenders the notion that, notwithstanding the novelty of the issues in dispute, the plaintiffs in landmark cases have legal rights to redress that guide and constrain the judgements of the courts antecedently to their making decisions. Secondly, even if we assume *arguendo* that landmark cases should be understood as decisions on indeterminate or as yet legally unregulated issues, at the very least we should like *some* account of what, if any, standards govern the judgements of the courts in such cases,

and thereby determine the legal outcomes in question. Absent such an account, I conclude that the orthodox view fails to leave sufficient room for mistake or error about the existence and content of legal requirements.

28.2 The Charge of Esoteric Law

So we have eschewed the first fork in the road. We should, in other words, expect a richer standard of objectivity in the legal domain than that which is constituted by the shared or common criteria for the application of legal rules. The formulation of the objectivity condition that we have to settle on, in particular, is how is it possible for a *community* of lawyers and judges to be mistaken about the existence and content of legal requirements, given how their beliefs, attitudes, and judgements are partly constitutive of those facts about what the law requires in a given jurisdiction.

At first blush, the model of principle seems uniquely well placed to satisfy the objectivity condition, so understood. Given its view that certain moral principles feature among the constituents or determinants of legal standards, it would certainly appear to leave the requisite room for mistake or error about what the law requires on a particular issue. Given that the validity or normative force of a moral principle does not, it seems, depend on anyone knowing of its existence or believing its content, the upshot is that we have before us an elegant proposal that suffices to leave a considerable gap between individual judgement and case in the legal domain.

But therein lies the rub. As Leslie Green has often argued, the model of principle would appear to entail that ‘there can be law—lots of law—that no one has ever heard of’.⁴⁸ Whether a moral principle justifies some arrangement or practice does not depend on anyone knowing or believing that it does. Hence, ‘Depending on the prospects for moral knowledge, there can be law that is not even knowable.’⁴⁹ In a word, this is the objection that the model of principle threatens to render law ‘esoteric’.⁵⁰

What I now wish to do is develop my own version of this objection with a view to establishing that the model of principle fails to satisfy the objectivity condition in an altogether convincing fashion.

To begin with, it seems clear that the model of principle presupposes *moral cognitivism*: the view that moral statements express beliefs, which are apt for truth or falsity.⁵¹ This much is evident when we consider that if the *non-cognitivist* is right; roughly, that there *are no* moral truths or facts, it is difficult to see how it is, exactly, that true propositions about the substantive moral impact that enacted statutes and

decided cases have on what we ought to do could constitutively determine what the law requires in a given jurisdiction. So, let us just assume, for the sake of argument, that moral cognitivism is true. It therefore follows, in principle, that we may often be wrong or ignorant about what morality requires of us; just as we were, by hypothesis, when slavery was considered a more or less accepted practice.⁵²

But is it plausible to say the same of law? The model of principle is committed to an affirmative answer to this question. Given its view that legal requirements are constitutively determined by constructive interpretations of certain political practices in a given jurisdiction—paradigmatically, the enactment of statutes and the adjudication of cases—it follows that lawyers and judges may often be in moral error about what our political practices require of us now, and *therefore* in legal error about what the law requires in a given jurisdiction. I think this suggestion is beset with difficulties. Let me illustrate them by way of the following example.

Consider English law in 1736. Let us assume that the following statement of Sir Matthew Hale encapsulates what lawyers and judges then regarded as a standard enforceable for the purposes of criminal law: ‘But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.’⁵³ Of course, the law on this matter is very different nowadays, since the so-called ‘marital rape exemption’ no longer applies.⁵⁴ But is it plausible to say that this community of lawyers has made a mistake? More specifically, that they are in moral error about what their political practices require them to judge in the instant case, and *therefore* wrong or ignorant about what the law requires on this particular issue?

I am inclined to answer this question negatively, though some care needs to be exercised in articulating why the manifest intuitiveness of this response is supposed to present a problem for the model of principle. Let us begin by stipulating that Hale’s statement paints an accurate portrait of the moral beliefs held in England *circa* 1736. These beliefs are clearly morally wrong and, given that I am prepared to accept moral cognitivism for the purposes of this argument, I can perfectly well accept the claim that what we have here is a clear case of mistake or error about what morality requires of us—in particular, about the content of those rights and duties that legislatures and courts are properly entitled to enforce on demand. It does not follow, however, that the lawyers and judges of the time were *ipso facto* mistaken about what the law requires on this particular issue. Quite the opposite, it seems to me: to accept that claim would be tantamount to denying the importance of a distinction that really *ought* to be observed in

this vicinity, and it counts against the model of principle that it is by no means clear how it can do so.

The model of principle holds that what the law requires in the instant case is constitutively determined by constructive interpretations of certain political practices in a given jurisdiction; paradigmatically, the enactment of statutes and the adjudication of cases. Accordingly, it remains perfectly possible, on this view, that *no* marital rape exemption obtained in English law at the time. In brief, the reasonable application of the model of principle that I am canvassing here is that on the correct understanding of the substantive impact made by certain descriptive, contingent, or non-normative facts about what certain individuals did or said on the matter of marital rape—more specifically, on the correct understanding of *consent* implicit in previous decisions and practice—it follows that English law did not recognize the marital rape exemption, as articulated in Hale’s statement.⁵⁵ But this suggestion is plainly untenable. Surely, what we want to say in this example is that there *was* a marital rape exemption in force in English law at the time, *and* that this provision was inconsistent with any plausible moralized account of the rights and duties that legislatures and courts were properly entitled to enforce on demand in contemporary England. Indeed, as Lord Lane put the point in *R v R* (which explicitly denied the validity of a marital rape exemption in English law), one of the primary *reasons* why we react to Hale’s statement in the way that we do is precisely because so morally wrong a provision formed part of English law.⁵⁶ In any event, this is precisely the distinction that would seem denied to us on the model of principle, and I take this to go a long way towards showing why we should resist equating mistake or error about the existence and content of legal requirements with moral error about what our political practices require of us now.

My example is liable to mislead, so some clarifications are in order. First, it must here be remarked that my point is not quite the same as Leslie Green’s. Green writes that if the model of principle holds then, ‘Depending on the prospects for moral knowledge, there can be law that is not even *knowable*.’⁵⁷ This is melodramatic—to say the very least. In my view, proponents of the model of principle can justifiably object that Green’s point rests on an uncharitable interpretation of their position. This is because although systematic error or ignorance about what the law requires is indeed theoretically possible, on their view, this is highly unlikely in practice and, in any case, the model of principle does not render law ‘esoteric’ in the precise sense of *unknowability* suggested by Green. We can develop this point in the following way. By hypothesis, the model of principle is committed to an epistemic corollary of the *ought-*

implies-can principle.⁵⁸ The material thesis, then, is that the law is constituted by reasons that apply to us; in other words, just those moral considerations the demands of which human agents are in principle capable of understanding. Furthermore, we should be at pains to emphasize the *type* of moral considerations that are in play on the model of principle. Typically, these involve the values associated with procedural fairness, democratic decision-making, and honouring legitimate expectations; that is to say, moral considerations firmly grounded in the shared history of specific political communities and, thus, most unlike ‘mind-independent’ facts such as the existence of any particular quark which, presumably, obtain independently of any individual or community having thought about or engaged with them. If this is right, it follows that the model of principle does not imply the existence of unknowable law in a given jurisdiction, and Green’s objection, as it stands, therefore, blows out of all proportion a seemingly innocuous commitment to there being objectively right answers to moral questions; specifically, from the perspective of the model of principle, objectively right answers as to what the law requires on a particular issue.

Secondly, I emphasize that the example is not designed to raise the ‘schoolboy’ criticism (= the *problem of wicked law*) that the model of principle cannot countenance the possibility of an unjust standard having the force of law in a given jurisdiction. Dworkin has emphasized that, ‘We have little trouble making sense of that claim once we understand that theories of law are interpretive. For we understand it to argue that the legal practices so condemned yield to no interpretation that can have, in any acceptable political morality, any justifying power at all.’⁵⁹ Whatever the merits of this response, by hypothesis, it could be applied in a relatively straightforward manner to our example of the marital rape exemption. At any rate, I do not wish to contest that here.

Finally, and in consequence, it will be easier to come to an understanding of my central claim as soon as we appreciate that it is epistemological in character. The objectivity condition demands that we provide a plausible model of the nature and scope of mistake or error about the existence and content of legal requirements. Doubtless the model of principle identifies such error with moral error about what our political practices require of us now. So, even if we have no truck with the *metaphysical* thesis that certain moral principles make propositions of law true, it counts against the model of principle if there are epistemological shortcomings in this connection.

Those shortcomings, to be sure, are precisely what the example of the marital rape exemption is designed to reveal. This example is in no way constructed to indicate

that the model of principle renders law unknowable, nor is it designed to raise the ‘schoolboy’ criticism that the model of principle cannot countenance the possibility of an unjust standard having the force of law in a given jurisdiction. On the contrary, as I have intimated, those difficulties strike me as either slight or artificial. The point of my example, by contrast, is that there *can be* and, indeed, often *is* an important disjunction between being mistaken about the substantive impact of political practice and being mistaken about what the law requires in a given jurisdiction. To put it another way, the indications are that being mistaken about the moral significance of political practice and being mistaken about the existence and content of those normative standards that form part of the law in a given jurisdiction is of a qualitatively different *kind*.

On no sensible interpretation is the model of principle able to account for this disjunction. Far from it: the responses that we have so far considered do not fully address the problems raised by my objection. Even if we accept the less abstract and more localized conception of moral knowledge canvassed above, and further set aside the problem of wicked law, still there really is no progress. Quite the opposite: what has been shown in our example holds good generally. More specifically, there is here a dilemma confronting the model of principle.

Either the marital rape exemption had the force of law in contemporary England, or it did not. If it did then, at the very least, we have to concede that this does not sit happily with the metaphysical claim that certain moral principles make it the case that the law requires what it does. But if it did *not*, then the scope for mistake or error about the existence and content of legal requirements seems much too large. The worry, in particular, is that it is by no means clear how we could ever account for the *explanandum* that lawyers and judges have superior knowledge of what the law requires in a given jurisdiction by subscribing to a version of the model of principle which entails that no marital rape exemption obtained in English law at the time. There is still much to be said for Green’s objection, then, once we situate it within the broader problematic underlying the integration challenge for the legal domain. So we shall have to do better, on this score, in trying to meet that challenge.

29. The Relevance Condition Revisited

The relevance condition is closely related to the objectivity condition, but it is not the same. Again, it is helpfully presented as a combination of two thoughts, which although inherently plausible enough in themselves, nevertheless, pull in opposite directions.

Consider our earlier example from trusts law doctrine. On the one hand, everyone is agreed that an adequate answer as to whether Jack is legally required to manifest and prove his declaration of trust in writing must make reference to enacted statutes and decided cases, which are understood for present purposes as certain descriptive facts about what legislatures and courts have said and done. Indeed, there seems to be little difficulty in identifying the Law of Property Act 1925 as being especially relevant in determining whether English law requires Jack to manifest and prove his declaration of trust in writing. On the other hand, how did this magic happen? How is it possible that merely descriptive facts—for instance, that 150 Members of the House voted in a certain way, or that judges as a matter of settled practice are not disposed to enforce oral declarations of trusts of land—make it the case that Jack is legally required to manifest and prove his declaration of trust in writing? Furthermore, even if we agree that enacted statutes and decided cases are relevant in determining what the law requires on a particular issue, it still seems pertinent to ask: how and why is that so? What makes them relevant? And what is it exactly *about* the enactment of statutes and the adjudication of cases that constitutively explains how and why these practices generate the normative standards—the legal rights and duties—that obtain in a given jurisdiction at a given time?

The reason why the relevance condition is closely related to the objectivity condition is that both emphasize, in their own way, the necessity of specifying some candidate facts external to the practices of enacting statutes and deciding cases, understood in descriptive terms, in order to arrive at an intelligible, constitutive explanation of legal standards. Starting with the relevance condition, facts about what we are disposed to do in the course of our practice are descriptive and contingent facts about us. They therefore differ in kind from any normative facts that determine what we ought to do. Such facts cannot, therefore, feature alone in the constitutive explanation of any standard; because in and of themselves they fix neither the content of the material practice, nor determine how the participants engaged in some practice are specifically required to judge its subject matter in the instant case. We have, then, to appeal to something *other* than those dispositions in order to settle which aspects of the practice are relevant, why they are relevant, and how it is exactly that they constitute the standards associated with the practice in question. And notice how, in so doing, we also make room for the possibility that the participants in the relevant practice may be mistaken about what it requires. Because the requirements associated with the relevant practice must, by hypothesis, be constituted in part by standards external to it,

participants in the practice may be mistaken about what it requires; notwithstanding how their beliefs, attitudes, and judgements are partly constitutive of the practice. To sum this up, as I have already argued, it seems that both an intelligible, constitutive explanation of legal standards and a convincing account of how lawyers and judges can be mistaken about what the law requires on a particular issue demands that we specify some candidate facts external to the practices of enacting statutes and deciding cases, understood in descriptive terms. That, in a nutshell, is precisely what is involved when it comes answering the constitutive question in a way that satisfies the relevance condition.

So, which facts are the likely candidates? Here we are presented with a choice between *either* an appeal to conceptual truths—specifically, about how legal rights and duties consist in those standards produced or endorsed by legal institutions in a characteristic way; *or* substantive claims about the discrete moral impact that the practices of enacting statutes and deciding cases have on what we ought to do. I shall refer to these hereinafter as the *formal* and *substantive* approaches to satisfying the relevance condition, and now indicate how the orthodox view and the model of principle offer respectively the most developed versions of each proposal.⁶⁰

29.1 In re the Concept and Object of Law

The orthodox view, as we have seen, is my preferred term for a prominent answer to the constitutive question that finds its best expression in the work of Joseph Raz, and proposes for consideration a certain version of legal positivism that we have conveniently labelled the sources thesis, which turns on law's necessary claim to legitimate authority.

Raz's argument about the necessary conditions that law must meet in order for that claim to be true is *par excellence* a formal approach to satisfying the relevance condition. This is because by means of conceptual analysis it tries to establish certain constraints of descriptive adequacy on what counts as a viable answer to the constitutive question. The proposal, more specifically, is that we best approach that question in two discrete steps. We open our account with a non-normative analysis of what is legally significant in legal practice and why by the lights of the practice itself. From that *legal point of view*, our task is to examine and elucidate the attitudes implicit in the language of officials who take action in the name of political institutions, such as judges adjudicating cases or parliaments enacting statutes. Conceptual reflection of this kind is

then said to identify a characteristic ‘logic’ of institutional enactment; in other words, a specific mechanism or technique deployed by political institutions in generating the normative standards that obtain in a given jurisdiction: to wit, that *what it is* to enact a statute or decide a case is to claim to be exercising legitimate practical authority.⁶¹ This conceptual claim is then thought to define the subject matter of a constitutive explanation of legal standards; in that it is supposed to identify certain salient features of law that candidate answers to the constitutive question must accommodate on pain of changing the subject matter. For only *then* do we proceed to the second and substantive step in our approach to the constitutive question by raising the issue of how, if at all, it is possible for political institutions to create genuine obligations in the specified way; that is to say, not merely those from the perspective or point of view of the institutions who issued the relevant directives. On this score, we conclude that it is, indeed, possible for political institutions to create genuine obligations in the specified way: specifically, when subjects would be more likely to comply better with reasons that apply to them by taking the say-so’s of political institutions of themselves to provide reasons for undertaking those actions prescribed by the directives in question.⁶²

What should we make of this influential, formal approach to satisfying the relevance condition? My conclusion is that while formal approaches certainly retain a core insight that we should very much like to capture in our answer to the constitutive question, they are, nevertheless, beset by a significant shortcoming.

The core insight is that candidate answers to the constitutive question must, it seems, have something to say about the characteristic, institutional processes by which political institutions generate the distinctively legal standards that obtain in a given jurisdiction at a given time. There is a difference, presumably, between constitutional law and constitutional convention; not every promise or agreement is a contract; taxation is not charity; and trusts are not merely fiduciary contracts. We cannot appreciate or test these distinctions without further elaboration of how and why the decisions and practice of legislatures and courts constitute standards that are to some extent autonomous of, or to some degree insulated from, the greater part of background political morality. This is one modest way of understanding Hans Kelsen’s remark that law is a ‘specific social technique’.⁶³ And, doubtless, formal approaches are on to something in trying to unpack in what that technique consists.

The challenge, mind, is to do so in keeping with the relevance and objectivity conditions. With respect to the former, we have to do so in a way that does not render unintelligible our account of how the descriptive facts that constitute those

characteristic, institutional processes make it the case that the law requires what it does. As regards the latter, we have to do so in a way that leaves sufficient room for mistake or error about the existence and content of legal requirements.

Thus, this is precisely where the shortcomings of adopting formal approaches to satisfying the objectivity and relevance conditions come to the fore. Although, to be sure, there is nothing unintelligible about an appeal to conceptual truths about how legal rights and duties consist in those standards produced or endorsed by legal institutions in a characteristic way,⁶⁴ we have, in my view, to reckon with the following difficulty, which takes us back to my earlier point about the tight connection between the objectivity and relevance conditions.

It is by no means clear why candidate answers to the constitutive question should accord explanatory privilege to the attitudes implicit in the sayings and doings of lawyers, judges, and other officials who are charged with the identification and application of legal standards. This, to be sure, is a further moral that I think we have to draw from our earlier discussion of incomplete understanding. There our concern was to reveal the inadequacies of a criterialist perspective on what determines the correct extension of legal *concepts*. And I suggest that there is every reason to think that similar considerations apply to the concept of *law* itself.

Let us distinguish between a *global* and *local* worry in this connection. For Raz it follows from our very concept of law that legal standards consist in authoritative directives. That conceptual truth, i.e. that law claims legitimate authority, is, in other words, supposed to establish certain constraints of descriptive adequacy on what counts as a viable answer to the constitutive question. No account of how, why, and in what way facts make law can succeed, more specifically, on this view, unless and until that account both explains and satisfies this constraint. So notice the pertinent strategy. We constitutively explain the legal relevance of political decisions and practice by appealing fundamentally to our shared conceptual scheme or common understanding of law. Make no mistake: this is essentially a matter of elucidating the latent criteria that, by hypothesis, guide our extensions of LAW and govern other inferences of ours involving that concept. But then, why suppose that even a full and accurate specification of these criteria could ever identify certain salient features of law that candidate answers to the constitutive question must accommodate on pain of changing the subject matter?

Hence, the global worry about this formal approach to satisfying the relevance condition is that it comes into conflict with our earlier conclusions about the nature of conceptual content, more generally speaking. If we are going to be anti-individualistic

about legal concepts and content, then let us be anti-individualistic about LAW too. Having a concept, as we have seen, is essentially a matter of being responsible to standards that transcend the collective usage of that concept. So there is no place for shared rules and criteria, on this view. Concepts are rather individuated by the substantive considerations that make best sense of our extensions of those concepts, and moreover establish that this ‘underlying pattern of activity *should be as it is*’.⁶⁵ If there is any moral to be drawn from Burge’s work, in particular, it is that we should be interpretivists about LAW, not criterialists along the lines suggested by the orthodox view.

To say this much, I hasten to add, is not to refute the existence of a shared concept of law. Nor is it to deny that this concept may be elucidated along the lines suggested by Raz. The point is that we are not held *hostage* by the results of such enquiry in our search for a viable answer to the constitutive question. Facts about how we are disposed to use ‘law’ and extend LAW respectively do not *of themselves* furnish the correct explanation of what makes it the case that the law requires what it does. Those dispositions are finite, descriptive, and susceptible to deviant hypotheses. In this way, our conception of law is responsible to standards that provide for the permanent possibility of substantive challenge to our existing practices.

It remains for me to consider, briefly, the following potential objection. ‘Burge’s account is contested, of course;⁶⁶ conceptual analysis is controversial territory, to be sure;⁶⁷ and the orthodox view is but *one* of many other formal approaches that could and have been developed in response to the relevance condition.⁶⁸ Does it not follow that our discussion has been in vain?’

‘Not really’ is the long and short of my response. This is because even if we put to one side our global, methodological worry about the ways and means of conceptual analysis, it bears reiterating that there is a more local worry with which we have to contend. In a nutshell, according explanatory privilege to the attitudes implicit in the sayings and doings of lawyers, judges, and other officials entails that the standard of objectivity in the legal domain cannot, even in principle, transcend that which is constituted by the shared or common criteria for the application of legal rules. We have already seen in connection with landmark cases such as *Donoghue v Stevenson* how this fails to leave sufficient room for mistake or error about the existence and content of legal requirements. So, to sum this up, for tightly connected reasons we conclude that the orthodox view fails to satisfy the objectivity and relevance conditions on candidate solutions to the integration challenge for the legal domain.

29.2 *On Saving the Relevant Phenomena*

The model of principle is markedly different in its substantive approach to satisfying the relevance condition. We do not here arrive at the conclusion that certain moral principles feature among the constituents or determinants of legal standards on the basis of conceptual analysis; the correct explanation of how facts make law, on this approach, rather, depends on the genuine principles or values in virtue of which those facts make it the case that the law requires what it does. The thought, more specifically, is that we best individuate the distinctiveness of legal standards by showing how the practices of enacting statutes and deciding cases have a discrete moral impact on what we ought to do. It is precisely for this reason why the coercive aspects of legal practice feature so prominently on substantive approaches to satisfying the relevance condition. For substantive approaches, the model of principle chief among them, to be sure, have much more to do than merely *point out* that legal practice, plausibly, makes a moral difference to our antecedent rights and duties; they have, rather, to identify a *characteristic* moral impact, which can thereby furnish the resources necessary to distinguish those legal standards from others of political and interpersonal morality. The relevance of *coercion*, then, lies in how it is supposed to demarcate the discrete moral concern that is generated by legal practice. The fact that legal standards have the effect of licencing the coercive enforcement of such standards across persons makes it the case that citizens are entitled to principled consistency in determinations of what the law requires on a particular issue.⁶⁹ *That*, by hypothesis, is why the moral principles that best fit and justify descriptive facts of past political or institutional practice are thought to feature among the constituents of legal standards. For they constitutively explain what it is exactly about enacted statutes and decided cases that generates the legal rights and duties that obtain in a given jurisdiction: how, why, and in what way these descriptive facts about what political institutions have said and done have the legal consequences that they do.

Much like formal approaches, there are benefits and detriments to adopting a substantive approach to satisfying the relevance condition—at least on the model suggested by the model of principle in its present form. Substantive approaches have the redeeming merit of being in principle able to satisfy both the relevance and objectivity conditions. Given that the principles in play on this view are genuine moral principles and not merely those which are believed to be true by judges and other officials, they are both sufficiently external to the practices of enacting statutes and deciding cases, understood in descriptive terms, and moreover leave sufficient room—too much room,

in fact, if the arguments of the previous section hold—for mistake or error about the existence and content of legal requirements. Accordingly, as was suggested at the outset of this chapter, my view is that substantive approaches offer the most promising route towards providing a satisfactory answer to the constitutive question. There is an additional problem with this way of proceeding, however, and what I should now like to do in the remainder of this section is indicate what that problem amounts to.

The pressing difficulty confronting the model of principle when it comes to satisfying the relevance condition is that it individuates legal standards far too coarsely.⁷⁰ Proponents of the model of principle, as we have seen, hold that we can best account for the distinctiveness of legal standards by showing how the practices of enacting statutes and deciding cases have a discrete moral impact on what we ought to do. But, as I shall now go on to explain, there are grounds for concluding that this strategy fails to save the relevant phenomena.

Consider the following example. In many jurisdictions there is an important distinction to be drawn between constitutional law and constitutional convention. Constitutional conventions are here understood as forms of political custom, i.e. informal or uncodified procedural arrangements that often render certain acts impermissible in practice when they would otherwise be considered permissible on a straightforward reading of the constitutional law. Let us, by way of fixing ideas, take as our main example the Salisbury Convention, which, in short, forbids the House of Lords from opposing the second or third reading of any government legislation that was promised in its election manifesto. The convention is long standing; it may therefore have given rise to a legitimate expectation among parliamentarians that the convention will be followed; and doubtless all of this could, I suggest, be plausibly said to rest on moral considerations. It would be wrong, more specifically, for our predominately unelected second chamber to frustrate the legislative initiative of the democratically elected government. Hence the controversy last year when it was intimated by Party leader Tim Farron that Liberal Democrat peers would break with the Salisbury Convention and block Prime Minister David Cameron's extension of the 'right to buy' housing policy.⁷¹ In any case, the point is that absent some exceptional countervailing considerations, which we need not consider here, it strikes me as plausible that their Lordships *do*, on the one hand, have a moral obligation to vote in favour of the government legislation that was promised in its election manifesto. And yet, on the other hand, it is in the very *nature* of constitutional conventions of this kind that they do not amount to legal obligations. There is here, then, a potential counterexample to the

claim that we best account for the distinctiveness of legal standards by showing how the practices of enacting statutes and deciding cases have a discrete moral impact on what we ought to do. Constitutional conventions, it seems, show how the workings and operations of political institutions can simultaneously have a discrete moral impact on what we ought to do but which, nevertheless, falls *short* of what we would be prepared to characterize as change to our legal obligations. So the worry is that the model of principle fails to save the relevant phenomena.

What has gone wrong here? Earlier I suggested that, notwithstanding their difficulties, formal approaches, such as the orthodox view, nevertheless retain the core insight that candidate answers to the constitutive question simply must have something to say about the characteristic, institutional processes by which political institutions generate the distinctively legal standards that obtain in a given jurisdiction at a given time. That is precisely what is missing on the substantive approach suggested by the model of principle. As public law scholars often point out,⁷² conventions are standards pertaining to the constitution that are not recognized by the law courts. Because they are not so recognized, they are not best regarded as distinctively legal standards. This is not to overlook their considerable importance. As Peter Hogg writes:

[B]ecause they do in fact regulate the working of the constitution they are an important concern of the constitutional lawyer. What conventions do is to prescribe the way in which legal powers shall be exercised. Some conventions have the effect of transferring effective power from the legal holder to another official or institution. Other conventions limit an apparently broad power, or even prescribe that a legal power shall not be exercised at all.⁷³

All the same, the point remains that constitutional law and constitutional convention are very different beasts, such that if the model of principle has difficulty accounting for this distinction, then that is indicative of its inability to individuate legal standards in a sufficiently fine manner.

I am unable to find the resources internal to the model of principle that would enable it to explain this worry away. On the contrary, even a cursory reading of what Dworkin, in particular, has to say about the discrete political value of ‘integrity’ suggests that the model of principle is unable to handle the difficulties thrown up by the Salisbury Convention counterexample. Dworkin holds, more specifically, that ‘We have two principles of political integrity’.⁷⁴ The former ‘*legislative*’ principle ‘restricts what

our legislators and other lawmakers may properly do in expanding or changing public standards'; whereas the latter '*adjudicative*' principle 'requires our judges, so far as this is possible, to treat our present system of public standards as expressing and respecting a coherent set of principles'.⁷⁵ The former principle, to be sure, is our focus at this stage.

The crucial point is that the Salisbury Convention would, it seem, be a proper object for those constructive interpretations that, on the model of principle, make it the case that the law requires what it does. Proponents of this approach cannot, therefore, dismiss this practice as irrelevant in the determination of certain legal rights and duties. Any such practice is relevant, in line with our very *concept* of law, on this approach, if and when it guides and constrains the power of government and, thereby, contributes to the justification of official coercion.⁷⁶ And, for the reasons outlined in the quoted passage from Hogg, that condition is *trivially* satisfied by our practice of forbidding the House of Lords to oppose the second or third reading of any government legislation that was promised in its election manifesto. Indeed, in Britain and other commonwealth countries, there can be no doubt that it is convention rather than law that determines many crucial questions of governmental power. So we have to conclude that the model of principle, in its present form at least, lacks the resources necessary to explain why constitutional law and constitutional convention are very different beasts, which is indicative of its inability to individuate legal standards in a sufficiently fine manner.

Of course, proponents of the model of principle, by way of response, could always adopt an *eliminativist* position on the distinction between constitutional law and constitutional convention. This is precisely the strategy that T.R.S. Allan has deployed in his recent work.⁷⁷ The distinction is highly questionable, on his view. In particular, he suggests that it stems from a positivistic outlook on constitutional practice, which we needn't buy into at the outset. The accepted wisdom, as we have seen, is that conventions are standards pertaining to the constitution that are not recognized by the law courts. But then, why should a true understanding of what our constitutional practice *really* amounts to be held hostage by that accepted wisdom? If constitutional practice is ripe for constructive interpretation, then what the courts have said, done, and are disposed to do, on this score, is merely the raw data. By hypothesis, the demands of the constitution are sensitive to basic moral and political values; legality chief among them. So, when we take that larger view, the neat distinction between constitutional law and constitutional convention seems singularly unhelpful and arbitrary. To quote Allan directly, what the constitution demands in any one particular case:

[W]ill sometimes become apparent only in the light of prominent features of political practice or convention. Questions of legality are intimately linked with considerations of legitimacy, undermining neat divisions between public law and political principle. Distinctions drawn between legal and political questions should reflect the analysis made of specific constitutional claims: they should be part of the conclusions of that analysis rather than its premises.⁷⁸

Allan's eliminativism, however, strikes me as unsatisfying. On the one hand, he should be commended for recognizing the *prima facie* difficulty that the model of principle has in accounting for the distinction between constitutional law and constitutional convention. On the other hand, the costs of endorsing his position come at an extremely high price. Remember that constructive interpretations of a given practice are to be tested along two dimensions: fit and justification. Allan may be correct that the distinction between constitutional law and constitutional convention appears arbitrary in connection with the justification dimension. Yet there is a significant worry about the dimension of fit. Our practice is to distinguish constitutional law and constitutional convention as different in kind. The question is whether the model of principle can account for this distinction. Allan's proposal entails that the model of principle is unable to do so. *A fortiori* his proposal wishes the distinction away. We still stand in need, then, of some resources internal to the model of principle that would enable it to individuate legal standards in a sufficiently fine manner. Absent such an account, I conclude that it fails to save the relevant phenomena.

30. Learnability and the Epistemological Condition Once More

The moral drawn in the last two sections is that the orthodox view and the model of principle fail to negotiate the objectivity and relevance conditions that need to be satisfied by adequate solutions to the integration challenge for the legal domain. These conditions, to reiterate, function as specific constraints on candidate answers to the constitutive question, and the indications are that the model of principle does a better job of meeting them. We cannot meet the objectivity condition by appealing to the notion of incomplete understanding, and we cannot satisfy the relevance condition by relying on conceptual truths about what law is and how it works. On the other hand, the model of principle also has its difficulties: in its present form, at least, it would appear to render law esoteric, and moreover individuate legal obligations far too coarsely.

The present section, then, aims at examining how our two leading theories of the nature of law fare with respect to the epistemological condition. This condition states that candidate answers to the problem of legal knowledge should explain or at least be consistent with the fact that legal knowledge is essentially knowledge-*how*: a complex set of dispositions to infer according to legal facts, rather than propositional knowledge *that* such facts obtain and why they do so. I shall therefore be arguing that the model of principle, in particular, fails to satisfy this constraint, and thereby completing my case for the negative claim that it is unable to provide an adequate solution to the integration challenge for the legal domain.

I propose to organize my discussion around an earlier principle. In Chapter II, we observed that it is of no small significance for metaphysical theories of what legal standards are that the law is *learned*, since any such theory will be adequate only if it explains or is at least consistent with this fact.

The principal task confronting such theories, as we have seen, is to account for how it is exactly that legal rights and duties obtain in virtue of descriptive facts about what legislatures and courts have said and done. The problem of legal knowledge, however, reveals why we have good reason to levy learnability conditions on candidate answers to that constitutive question. If lawyers and judges have superior knowledge of what the law requires in a given jurisdiction, presumably this is on account of their having learnt the law by engaging in a distinctive education and training. The present point is that candidate answers to the constitutive question should explain or at least be consistent with this fact.

The rationale for imposing this constraint stems from the truth that any theory *T* of what legal standards are and how they obtain will *ipso facto* provide a specification of our knowledge of them. To put it another way, since *T* furnishes what one knows when one knows the law, to the extent that what one knows is learned, *T* should be learnable.

Consider again our example from trusts law doctrine. To tell some metaphysical story about what makes it the case that *p* holds is to specify the *content* of our knowledge that Jack is legally required to manifest and prove his declaration of trust in writing. As a result, we cannot accept just any-old theory of what legal standards are and how they obtain, such that *if* lawyers and judges were to know *T* they would count as knowing what the law requires in the instant case; quite the opposite: we should rather expect a theory that meshes with and, moreover, ratifies their actual means or methods in ascertaining the content of the law in a given jurisdiction at a given time.

Suppose it were otherwise. We would then be committed, in principle, to a theory of what makes it the case that the law requires what it does that fails to establish the requisite links between the underlying metaphysics of legal standards, and the actual methods deployed by lawyers and judges in ascertaining the existence and content of these standards on a case by case basis; in short their epistemology. Such a theory would thereby overlook the *explanandum* that lawyers and judges have superior knowledge of what the law requires in a given jurisdiction, because it would neither explain nor be consistent with the fact that they have learnt the law and acquired this knowledge on the basis of a distinctive education and training in deploying those methods.

To impose such a constraint is not to renege on the possibility of there being mistake or error about what the law requires in a given jurisdiction, and the obvious truth that developed legal systems contain so much law that no one could hope to learn all of it is neither here nor there. The moral to be drawn about learnability is that if some theory of how legal standards obtain generates implausible consequences regarding how these standards are known to obtain, and in particular what such knowledge consists in, then that should serve as a check on the plausibility of certain metaphysical theories of how it is exactly that legal rights and duties obtain in virtue of descriptive facts about what legislatures and courts have said and done. Hence the salience of this *learnability* principle when it comes to assessing the epistemological implications of our two leading theories of the nature of law.

30.1 Philosophers on the Bench?

To begin with the model of principle, earlier I said that the method of constructive interpretation deployed by Hercules speaks every bit as much to the problem of legal knowledge as it does to the constitutive question. I was concerned, more specifically, to resist a *heuristic* understanding of the precise role that this yarn about a superhuman judge is supposed to play in the central argument of *Law's Empire*. I do not believe that the point of the story about Judge Hercules is merely to model in a creative fashion what is involved in providing an adequate answer to the constitutive question; no more, no less. By contrast, on my reading, Hercules is supposed to provide a model of what lawyers and judges both take themselves to be doing and should be aiming at anyway in determining what the law requires in the instant case. Certainly, we can only but approximate the superhuman feats of Hercules on the bench. Yet I find nothing in

Dworkin to suggest that the method deployed by Hercules is, in any shape or form, supposed to be different in kind from the type of argument deployed by lawyers and judges in ascertaining what the law requires on a given point. On the contrary, consider these passages:

Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law.⁷⁹

Legal reasoning means bringing to bear on particular discrete legal problems, such as those I described, a vast network of principles of legal derivation or of political morality. In practice, you cannot think about the correct answer to questions of law unless you have thought through or are ready to think through a vast over-arching theoretical system of complex principles about the nature of tort law, for example, or about the character of free speech in a democracy, or about the best understanding of the right to freedom of conscience and of personal ethical decisions.⁸⁰

To reiterate, the implications here can only be radical and revisionary. The model of principle suggests that to know the law is to have propositional knowledge of how the content of an abstract theory of political obligation plays out in more concrete instances. The model of principle entails, more specifically, that determining what the law requires on a particular issue is nothing less than a substantive exercise of political philosophy. When lawyers and judges determine what the law requires in the instant case, their task is to identify which beliefs are true about the substantive moral impact made by enacted statutes and decided cases on what we ought to do. The worry, in a nutshell, is that this is straightforwardly inconsistent with our earlier findings on the problem of legal knowledge.

Indeed, having an explicit belief that tracks the truth about what the law requires in a given jurisdiction is not only *insufficient* for legal knowledge, but also *unnecessary*. Legal knowledge is better modelled as a kind of knowing how. We have, somehow, to account for the possibility that lawyers and judges are able to reach the right outcomes in particular cases *despite* their lack of familiarity, for instance, with the theoretical

considerations that may or may not impinge on the ‘nature of tort law’, as Dworkin puts it. Legal knowledge cannot, by hypothesis, essentially be a matter of being acquainted with facts, say, about the true nature and basis of corrective justice, and in particular what it requires of us in the instant case. On the contrary, we do better to attribute to lawyers and judges, not some explicit beliefs about the status of legal facts, but rather type-2 dispositions to infer or reason according to them.

The proposed model is equally inconsistent with our learnability principle. Consider again our example from trusts law doctrine. Everyone is agreed that lawyers and judges have superior knowledge when it comes to determining the sufficiency of Jack’s oral declaration to create a valid trust of land in Jill’s favour. But in what does such knowledge consist? Assuming the model of principle offers a satisfactory answer to the constitutive question, the implications are clear: that the superior knowledge of lawyers and judges consists in a type of *moral expertise*; it consists, as far as our example goes, in the ability to deploy certain moral principles in substantive arguments as to why the enactment of the Law of Property Act 1925, among other things, justifies the imposition of a standard that requires Jack to manifest and prove his declaration of trust in writing.

No doubt we should resist that entailment. Lawyers and judges are not moral experts: it does not adequately characterize their practice to say that they are concerned to elaborate how an abstract theory of political obligation plays out in more concrete instances, and it is by no means clear how legal knowledge could ever be area-specific on such a conception. True, the kind of knowledge in play on the model of principle could be conceived as *tacit* rather than explicit. But still there really is no progress. For it would then be unclear what, if *any*, relation there is supposed to be between the underlying metaphysics of legal standards, and the actual methods deployed by lawyers and judges in ascertaining the existence and content of these standards on a case by case basis—in short, their epistemology; still less would we thereby have any account of the *explanandum* that lawyers and judges have superior knowledge of what the law requires in a given jurisdiction: this is because the proposal would neither explain nor be consistent with the fact that they have learnt the law and acquired this knowledge on the basis of a distinctive education and training in deploying those methods; hence my conclusion that in its present form, at least, the model of principle fails to satisfy the epistemological condition.

The orthodox view, as I see it, suffers from no such difficulties. On the contrary, whatever difficulties it has in tackling the constitutive question, the indications are that

the orthodox view is broadly correct in its approach to the problem of legal knowledge. For the subsumption thesis is squarely in keeping with the epistemological condition. The subsumption thesis has it that legal knowledge essentially consists in the superior application of general rules to particular cases. And, as Ryle writes, ‘The ability to apply rules is the product of practice.’⁸¹ More specifically, ‘We learn *how* by practice, schooled indeed by criticism and example, but often quite unaided by any lessons in the theory.’⁸² Such a proposal is, perforce, intimately connected with controversies surrounding what it is to follow rules, exactly; some of which we have had occasion to examine in earlier sections of this essay. All the same, by allowing logical space for the possibility that lawyers and judges are able to reach the right outcomes in particular cases *despite* their lack of familiarity with the theoretical considerations that impinge on those matters coming before them in their official capacity, it should be uncontroversial that the orthodox view is, to a significant degree, more consistent with our earlier findings on the nature of legal knowledge, and therefore, epistemologically speaking, to be considered superior to the model of principle.

31. Final Observations on the Ensuing Tension

We have now reached the terminus of a long argument in which I have sought to elaborate the form, content, and detail of the integration challenge for the legal domain. It will therefore be useful for me to rehearse, with an additional gloss or two, the principal suggestions about our challenge that I have made so far.

By the ‘form’ of our challenge I mean the abstract and general claim that the metaphysics and epistemology of legal standards must *somehow* stand in a harmonious relation, which is what I argued for in the second chapter of this essay. There I was at pains to establish that the constitutive question and the problem of legal knowledge are best regarded as two facets of a larger puzzle, because our pre-theoretical conception of law is such that we should expect or anticipate a simultaneously acceptable answer to both of these questions.

I then went on, in the third and fourth chapters of this essay, to specify the ‘content’ of our challenge, by which I mean a discrete and elaborated conception of how the metaphysics and epistemology of legal standards *should* stand together; and here I was especially concerned to arrive at some understanding of the constraints, desiderata, or adequacy conditions that determine the right type of solution of our challenge.

My claim in this regard was that adequate approaches to the integration challenge for the legal domain are constrained by the programme of legal dispositionalism. At the core of this programme lies the linking thesis. The linking thesis states that the dispositions of lawyers and judges in a given jurisdiction should be equally prominent in viable answers to both the constitutive question and the problem of legal knowledge; and yet, it emerged that this embryonic thought is just as much a further source of perplexity as it is of insight.

From one point of view, the epistemological condition insists that their having type-2 dispositions to infer or reason according to legal facts is wholly constitutive of the superior knowledge of lawyers and judges of what the law requires in a given jurisdiction. From another point of view, the objectivity and relevance conditions entail that their having type-1 dispositions to regard certain acts or events such as the enactment of statutes and the adjudication of cases as having legal significance can only be partly constitutive of legal standards. Type-1 and type-2 dispositions, to be sure, are individuals of the same species. So it seems that we are being pulled in opposite directions. How can these dispositions at once be wholly constitutive of legal knowledge but only partly constitutive of legal standards? How, one wonders, can we satisfy the objectivity, relevance, and epistemological conditions simultaneously?

In this chapter, I have argued that our two leading theories of the nature of law fail to square this circle. In this way, my discussion has further sought to reveal the ‘detail’ of the integration challenge for the legal domain. Indeed, inductively speaking, the exhaustive debate over the respective merits of the orthodox view and the model of principle suggests that these theories track a pertinent duality at the heart of our thought and talk about legal standards, and at the same time struggle to do justice to it.

On the one hand, the model of principle is broadly correct in its approach to the constitutive question. The basic idea is that certain moral principles feature among the constituents or determinants of legal rights and duties. The normative force of a moral principle does not, it seem, depend on anyone knowing of its existence or believing its content. The upshot is that we have before us an elegant proposal that both suffices to leave the requisite gap between individual judgement and case in the legal domain, and moreover blocks any illicit attempt to define the subject matter of legal obligation on the basis of a flawed version of conceptual analysis. But this is not all plain sailing. In its present form, the model of principle entails that there can be lots of law that no one has ever heard of, and we have further observed that it fails to save the relevant phenomena by individuating legal obligations far too coarsely.

On the other hand, the orthodox view is broadly correct in its approach to the problem of legal knowledge. As we have seen, the model of principle entails that legal knowledge essentially consists in the acquisition of true beliefs about the discrete moral impact made by enacted statutes and decided cases on what we ought to do. No doubt we should resist that entailment. Lawyers and judges are not moral experts: it does not adequately characterize their practice to say that they are concerned to elaborate how an abstract theory of political obligation plays out in more concrete instances, and it is by no means clear how legal knowledge could ever be area-specific on such a conception. By contrast, the notion suggested by the orthodox view that legal knowledge essentially consists in the superior application of general rules to particular cases suffers from no such difficulties.

In short, it must therefore be tempting to reconcile these respective insights of the orthodox view and the model of principle; and in seeking to determine the root cause of that temptation, in this chapter, I have thereby tried to provide a platform for a superior solution to the integration challenge that forms our concern.

So the challenge comes down to this. What makes it the case that the law requires what it does? What is it to know what the law requires on a particular issue? The integration challenge for the legal domain is to provide a simultaneously acceptable answer to both of these questions. Both questions we have to attack by appealing to the dispositions of lawyers and judges in a given jurisdiction. Yet we have to do so in a way that explains how those dispositions are at once wholly constitutive of legal knowledge but only partly constitutive of legal standards. We have to follow the model of principle in its approach to the constitutive question. But we have to do so in a manner that neither threatens to render law esoteric nor individuates legal obligations far too coarsely. We have to follow the orthodox view in its approach to the problem of legal knowledge. Yet we have to do so in a fashion that both leaves sufficient room for mistake or error about the existence and content of legal standards, and moreover blocks its attempt to define the subject matter of legal obligation on the basis of a flawed version of conceptual analysis.

The most natural response to our problematic, I suggest, is to attempt to find a third way. The task ahead of us, in the first place, is to find an answer to the constitutive question that satisfies both the objectivity and relevance conditions, which further avoids the shortcomings of the orthodox view and the model of principle in this connection. We then have to proceed, in the second place, to show how such an account

of truth in law meshes with a credible view of the nature of legal knowledge and thereby satisfies the epistemological condition.

That, in sum, is the integration challenge confronting the legal domain. There are, one suspects, all sorts of expansions and elucidations to be made, and all sorts of doubts and difficulties to be stated and overcome. Be that as it may, I hope I have done enough, at least, to establish that the challenge is genuine and repays further study.

Notes to Chapter V

- 1 Recall that I have borrowed both of these terms from Nicos Stavropoulos. The first from his (2012: 76); the second from his (2007: 33).
- 2 See especially Raz (1994a).
- 3 See in particular Dworkin (1977); (1988).
- 4 In consequence, my presentation of the model of principle in this section draws heavily on Stavropoulos (2007); Greenberg (2011). See too Greenberg (2014).
- 5 For ease of exposition; hereinafter, my use of ‘principles’ in the text should be taken to mean certain *moral* principles unless I say otherwise.
- 6 115 NY 506, 22 NE 188 (1889).
- 7 100 NC 240, 6 SE 794 (1888): where, as Earl J observed, ‘a wife had been convicted of being an accessory before the fact to the murder of her husband, and it was held that she was, nevertheless, entitled to dower’. See *Riggs v Palmer* 115 NY 506 (1889), at 514.
- 8 Dworkin (1977: 25).
- 9 Noteworthy contributions here are: Penner (2003); Shapiro (2011: 259 ff.); Waldron (2009).
- 10 Raz (2009a: 50).
- 11 Compare Scott Shapiro’s (2011: 170-3) suggestion that we stand in need of an authoritative system of rules or legal system in what he calls the ‘circumstances of legality’.
- 12 I am here, to be sure, alluding roughly to Hart’s (1994) prominent thesis that there are ‘rules of recognition’ at the foundations of legal systems.
- 13 Raz (1994: 221).
- 14 See *Gardner v Rowe* (1828) 5 Russ. 258.
- 15 See Mitchell (2013).
- 16 Dworkin (1988: 239).
- 17 Dworkin (1988: 225-75).
- 18 I believe that Stavropoulos (2015: 33-9) is committed to this reading, given those recent remarks of his on the issue concerning what, if any, work the concept of interpretation executes in Dworkin’s more recent jurisprudence. I am unsure of my attribution,

however; and, in any case, wish to thank Stavropoulos for allowing me to read and cite this draft.

19 For a representative sample, see Eisgruber (2006); Greenberg (2014: 1302); Penner (2003: 74-81); Shapiro (2011: 307-9).

20 Dworkin (2006: 50): ‘Legal reasoning means bringing to bear on particular discrete legal problems, such as those I described, a vast network of principles of legal derivation or of political morality. In practice, you cannot think about the correct answer to questions of law unless you have thought through or are ready to think through a vast over-arching theoretical system of complex principles about the nature of tort law, for example, or about the character of free speech in a democracy, or about the best understanding of the right to freedom of conscience and of personal ethical decisions.’

21 See especially Dworkin (1988: 3-11); Raz (2009: 47-87). For a helpful overview of the current state of play, see Shapiro (2007: 35-49).

22 I have borrowed this term from Peacocke (1999: 49). The model picked out by that term, however, which I shall later go on to discuss, is of my own conception.

23 Recall that I have borrowed this way of presenting my ideas from Stavropoulos (2004).

24 For helpful discussion, see Greenberg (2007).

25 Burge (2007: 104).

26 Burge (2007: 1).

27 Raz (2001).

28 Burge (2007: 109-10).

29 See McKendrick (2012: 255); Treitel (2007: 655-8).

30 My example draws on Stavropoulos (1996: 2-3). Recall that I am here following the convention of using small capitals to refer to concepts (e.g. CONTRACT), and quotation marks to indicate a word in natural language that expresses the concept (e.g. ‘contract’). See Laurence and Margolis (1999: 4, at note 1).

31 I have taken much instruction here from Higginbotham (2006: 144-6).

32 Frege (1997: 184).

33 This general take on conceptual content is especially well developed in Greenberg (2001).

34 Burge (2007: 151). My presentation of the upshot of Burge’s famous thought experiment further draws on Boghossian (2008: 146).

- 35 Burge (2007: 274).
- 36 See Dworkin (1988: 31-46). The term '*Criterial Model*' is owing to Stavropoulos (1996: 2, original emphasis).
- 37 Burge (2007: 263 ff.).
- 38 Burge (2007: 274, original emphasis).
- 39 Hart (1994: 244-8).
- 40 See, for instance, Endicott (2001).
- 41 Raz (2001: 18): 'The rejection of individualism does not amount to a rejection of criterial explanations. Criterial explanations are explanations in terms of rules setting criteria for the correct use of concepts, or words—and there is nothing individualistic in that—which are the correct rules if they are shared by the linguistic community. That sharing is precisely what non-individualism insists on. The sharing is established by the fact that all language users hold themselves responsible to the common criteria, whatever they are.'
- 42 Raz (2001: 18-19): 'Criterial explanations of concepts are consistent with the fact that people who use the rules setting out these criteria may make mistakes about which criteria are set by the rules. This means that there could be disagreements about the criteria for the use of concepts, even if the concepts are susceptible to criterial explanations.'
- 43 Burge (2007: 274, original emphasis).
- 44 Compare the argument developed in Dworkin (1977: 22-8), from which I have taken much instruction.
- 45 Wittgenstein (1967: §122, original emphasis). For some helpful discussion, with particular reference to what is involved precisely in providing an *übersehen* of our use of the verb 'to know', see Harré (2008).
- 46 This is precisely the conclusion drawn in Stavropoulos (2001: 79-88), to which I am much indebted.
- 47 See further Raz (2009a: 37-77).
- 48 Green (2012: xviii). See too Marmor (2005: 71-8).
- 49 Green (2012: xviii).
- 50 An alternative version of this objection can be found in Raz (1994: 224). See also Leiter (2007).

- 51 See generally Miller (2013). For a helpful survey of the moral cognitivism/non-cognitivism debate, see van Roojen (2004). Important contributions here are Blackburn (1998); Gibbard (1990).
- 52 The connection between slavery and the charge of ‘esoteric law’ is discussed further by James Penner in Penner and Melissaris (2012: 146-7).
- 53 Sir Matthew Hale, *Historia Placitorum Coronæ: The History of the Pleas of the Crown*, Volume 1, 629. Cited in *R v R* [1992] 1 AC 599 at 604, per Lord Lane.
- 54 *R v R* [1992] 1 AC 599. For a digestible background, see Hasday (2000).
- 55 Compare Dworkin’s (2006: 117) suggestion that the decision in *Dred Scott v Sandford* 60 US 393 (1857), in which the Supreme Court upheld slavery, ‘was an example of justices not ignoring but enforcing the framers’ intention because the original constitution contemplated slavery’.
- 56 [1991] 2 WLR 1065; [1991] 2 All ER 257.
- 57 Green (2012: xviii, emphasis added).
- 58 The pre-eminent statement of the principle is Kant’s (1929: A548/B576, original emphasis), of course: ‘The action to which the “ought” applies must indeed be possible under natural conditions.’
- 59 Dworkin (1988: 101-2).
- 60 I have borrowed both of these terms from Stavropoulos (2012: 78, 81). The criticisms of formal approaches to satisfying the relevance condition that I shall soon go on to develop are much indebted to his discussion. See also Stavropoulos (2009: 341-54).
- 61 See further Raz (1999a: 149-177).
- 62 This is the gist of what Raz (1986: 53, original emphasis) calls his ‘*normal justification thesis*’. I have no need to elaborate that thesis here, however.
- 63 Kelsen (2007: 15).
- 64 On the contrary, as Mark Greenberg (2006a: 233) explains, ‘In principle, conceptual truths (that are not value facts) about law could, with law practices, make rationally intelligible the content of the law.’ The conceptual claim, say, that law is a system of rules, which entails that moral considerations do not make propositions of law true, does not constitutively *reduce* or *identify* normative facts about legal standards with descriptive facts about what we say and do around here. That conceptual truth, if it is one, stands apart from those descriptive facts and is supposed to explain how normative facts about legal standards obtain *in virtue* of them. Although I cannot argue the point here, this trite observation, in my view, demonstrates that there is something quite wrong with Andrei Marmor’s recent suggestion that legal positivism, in particular, is committed to the ‘possibility of reduction’—in other words, the project of

- metaphysically or constitutively reducing facts about what the law requires to some other, more foundational facts of a non-normative type. See Marmor (2011: 12-13, 28-34); (2013).
- 65 Burge (2007: 274, original emphasis).
- 66 See Wright, Smith, and Macdonald (1998: 7-10); Boghossian (1998); McKinsey (1991).
- 67 See generally Jackson (1998).
- 68 For instance, on the planning theory of law advanced by Scott Shapiro and endorsed by David Plunkett, (1) conceptual truths are to be understood as Frank Jackson and David Chalmers have suggested they should be—that is to say, as a complex set of conditionals, which identify what must be the case in order for something to fall within the extension of a target concept, on which see Chalmers and Jackson (2001); and (2) the material conceptual truths are those that Shapiro is concerned to defend in *Legality*—in a nutshell, that the exercise of legal authority is a ‘form of social planning’, and that ‘legal rules are themselves generalized plans, or planlike norms, issued by those who are authorized to plan for others’; Shapiro (2011: 155). The whole proposal is explained best in Plunkett (2012: 145). Although I cannot argue the point here, this proposal seems to me in no way immune from the criticisms of formal approaches to satisfying the relevance condition that I have tried to raise in discussion of the orthodox view.
- 69 I am, of course, referring at this point to the discrete political value that Dworkin calls ‘integrity’. See Dworkin (1988: 176ff.). I shall before long be discussing that notion in greater depth.
- 70 There is a long-standing tradition of charging the model of principle with an overly coarse individuation of legal standards on the basis that its proposed individuation of those standards comes into conflict with certain necessary conditions for the existence of legal systems. See especially Gardner (2012: 270-4); Raz (1994: 225-6). I have no stake in that debate. My criticism of the model of principle, on this score, is of a very different order.
- 71 See Riley-Smith (2015).
- 72 See Dicey (2003: Chapter 2); Marshall (1987: Chapter 1).
- 73 Hogg (2007: 7).
- 74 Dworkin (1988: 176).
- 75 *ibid*, 217 (emphasis added).
- 76 *ibid*, 90-5.
- 77 Allan (2013: Chapter 2).
- 78 Allan (2013: 87).

- 79 Dworkin (1988: 90).
- 80 Dworkin (2006: 50).
- 81 Ryle (2000: 41).
- 82 Ryle (2000: 41).

VI

Conclusions, Connections, and Controversies

As I said at the start of this essay, general jurisprudence is marked by its irredeemably practical dimension. To be sure we wish to make progress on some broad and abstract issues such as what it is to have a legal right and duty, how and why they come into existence, and how it is exactly that we determine their content. Yet our concern with these questions and others like them is not exhausted by their intrinsic interest. It matters, for instance, whether I have a legal right to sue my landlord, whether he has a legal obligation to fix my boiler, and how judges and other officials are to determine that issue. The central questions of our subject, in other words, speak to a number of issues of considerable practical importance, and we should never lose sight of that in the general theory of what law is and how it works.

As a result, in this concluding chapter, I want to provide an indication of how the theoretical project undertaken above connects with the controversies of how we should decide to appoint judges, the legitimacy of their decision-making, and the proper aims and methods of legal education. I hasten to add that it is not my aim to ‘break new ground’ in this chapter. On the contrary, the discussion is speculative and not intended to make a detailed contribution to the aforementioned topics. All the same, in presenting an integration challenge for the legal domain and providing a framework for its adequate resolution, I believe that I may have also provided the resources necessary to address these more practical topics in a superior fashion. At any rate, at the very least, the discussion in what follows should serve to indicate the future direction of research suggested by the preceding chapters.

Perhaps the most significant thing I have tried to contribute in expounding an integration challenge for the legal domain is a demonstration of the precise sense in which the problem of legal knowledge is of fundamental importance in philosophical discussions of the nature of law. There can be no doubt that an impressive literature has developed, which taking the constitutive question as its starting point has much to teach us about how we should tackle the metaphysical issue of what makes it the case that the law requires what it does. On the other hand, it would be equally true to say that there has been an unfortunate tendency in these discussions; namely, to assign the

epistemological issue of what it is to know what the law requires on a given point a secondary or tangential importance. The crux of the integration challenge for the legal domain, then, is that this situation can stand no longer. On the contrary, as we observed at the very outset of this essay, our pre-theoretical conception of law is such that we should expect or anticipate a simultaneously acceptable metaphysics and epistemology of legal standards, and it is not my purpose here to rehearse the arguments I have offered in support of the claims: (1) that any adequate solution of our challenge is constrained by the programme of legal dispositionalism, (2) that our two leading theories of the nature of law fail to negotiate satisfactorily the attendant objectivity, relevance, and epistemological conditions in their respective accounts of what law is and how it works, and (3) that we should therefore be taking up the challenge in earnest.

Assuming I have said enough, then, to put the problem of legal knowledge ‘on the radar’ of general jurists, which among other things entails that we should resist gerrymandering the epistemic issue of what one knows when one knows the law into discussions of the nature of legal reasoning or the implication question of how we should square metaphysical theses about the nature of legal standards with a credible view of the practice of interpreting legal texts: how, if at all, does the theoretical discussion of this essay speak to the more practical concerns of our subject?

The first area of research I have in sight is the proper aims and methods of legal education. This is a topic that has seldom received the sustained attention of legal philosophers, which makes the contributions of James Penner and Ernest Weinrib in this area all the more an important and welcomed exception.

To begin with, Weinrib is exercised by the question, ‘Can Law Survive Legal Education?’¹ He is especially concerned to address a potential disjunction between, on the one hand, the practice of law and, on the other hand, the study of law in the university. What Weinrib has in mind by the practice of law is, among other things, the activities of lawyers giving legal advice and judges determining legal rights and duties; and, as regards the study of law in the university, the occasion for Weinrib’s discussion is the proliferation of interdisciplinary approaches to traditional areas of the common law, such as contract law, the law of torts, and the law of property.

Consider, for instance, the economic analysis of the law of torts. This approach, which finds an ardent advocate in the work of Richard Posner,² suggests that the rationale and content of the present law is best explained in terms of microeconomic theory. Take the law of nuisance. The private law of nuisance is that branch of the law of torts that governs unreasonable interferences with the use and enjoyment of land. As

such, it is an area of law closely connected with policies pertaining to the protection of the environment. Here the law must take a stand on which noises, smells, and other annoyances constitute actionable nuisances, and indeed whether claimants are entitled to redress for them despite having no legal interest in the relevant property. So perhaps the current state of the law in this area has an economic underpinning. Such, in any case, is the claim associated with the economic analysis of law. Roughly, the idea is that we can make best sense of what the law considers actionable nuisances and who are entitled to redress for them on grounds of efficiency. When the law, for instance, holds that a woman living in her mother's house is entitled to an injunction preventing telephone harassment despite having no legal interest in the property,³ it does so on the basis that legal standards are and should be Pareto efficient,⁴ which is to say that they must bring about a state of allocation of resources whereby it is impossible to make any one individual better off without making at least one individual worse off.

Why, then, might the ascendancy of the economic analysis of the law of torts effect a disjunction between, on the one hand, the practice of law and, on the other hand, the study of law in the university? The crux of the matter for Weinrib is that this way of approaching the law of torts, and indeed private law more generally, misunderstands its subject matter. As is well known, Weinrib has long maintained that it is rather *corrective justice* which best captures our thought and talk about this area of the law.⁵ That is to say, the rationale and content of the law is best explained not in terms of its promoting efficiency, but on the contrary in terms of its constitutive aim of redressing wrongs or breaches of duty committed by defendants at the expense of claimants. If this is right, it is by no means clear how the practice of law can survive legal education, because the approach to the latter suggested by the economic analysis of law misconceives what the law of torts is all *about*.

One colourful way of expressing this point is in terms of what James Penner calls his 'legal nightmare'.⁶ Imagine a possible world where legal education proceeds in a very different fashion to that in the actual world. Here students are not exposed to authorities and encouraged to make judgements about how they apply in certain fact situations. Instead, their education is organized around the classics of moral philosophy with a view to equipping them with certain basic principles which can then be elaborated in their determination of what the law requires in the instant case. Penner's concern is not merely to establish the rank implausibility of the suggestion that legal education *should* be so organized, which in his view counts against theories of law inspired by Dworkin. His more important point is a counterfactual one. If legal

education *were* to be organized in such a way, then we should lose the tools of our trade. Hence the legal nightmare: if the proliferation of such moralized and theoretical approaches to traditional areas of the common law continues at its present pace, then a dark age could dawn when lawyers and judges no longer have the more practical skills and critical capacities that we have reason to value them having.

Let me explain. The value of having a legal education, in Penner's view, is its inculcation of the ability to make judgements about how best to solve practical problems of the law's own making. Take taxation. In political philosophy seminars, as in life, we can debate the most fair or just allocation of resources. There is a qualitative difference, however, between that moralized or theoretical enquiry, and the enquiries at a lower level of abstraction that occupy the time of lawyers and judges in a given jurisdiction. We have antecedent obligations to contribute financially towards the provision of public goods in our community. True enough. But what constitutes 'residence', 'domicile', or 'income' for the purposes of capital gains or income tax? What measures, furthermore, should we adopt to decrease attempts at evading customs duties? How, in particular, should the law be developed to bring this end about? It is a platitude that lawyers and judges have superior knowledge when it comes to addressing questions of *this* type, not ones about the right and the good in politics. So we should expect any account of the proper aims and methods of legal education to reflect that.⁷

Very similar considerations apply to the controversies of how we should decide to appoint judges and the legitimacy of their decision-making. There can be no doubt that judges have a significant political power to determine what the law requires in those matters that come before them in their official capacity. As a result, it behoves us to examine what, if anything, justifies their having that political power, and the criteria by which we should choose those to wield it. In short, I think our intuitions are that we want learned lawyers on the bench, not philosopher kings.⁸ Continuing with the example of taxation, the indications are that it is neither their ability to debate the right or the good in politics, nor their facility in locating the most efficient allocation of resources that explains why judges are appointed. Nor does a capacity for this kind of theorizing appear to contribute to the legitimacy of the political power of judges to make judgements regarding, say, what constitutes 'residence', 'domicile', or 'income' for the purposes of the instant case. The indications, rather, are that it is, or should be, the superior knowledge of judges in dealing with matters at a lower level of abstraction that both explains their appointment and, at least in part, justifies their decision-making. In any case, the debate on this score is certainly well worth having.

Herein lies my suggestion, then, as to how the theoretical project undertaken in this essay may have something to contribute towards these more practical discussions. I believe the foregoing chapters show that there is something awry with the assumptions upon which these debates have proceeded. To be more specific, it has been consistently assumed that if we entertain seriously the idea that certain moral principles make it the case that the law requires what it does, then we become wedded to a hopeless epistemology of legal standards whereby lawyers and judges are said to have superior propositional knowledge about how the content of an abstract theory of political obligation plays out in more concrete instances. This notion is, predictably enough, rejected in debates over the criteria of judicial appointment, the legitimacy of judicial decision-making, and the proper aims and methods of legal education. Indeed, the very idea that lawyers and judges characteristically have such knowledge strikes one as highly implausible and, if Weinrib and Penner are correct, as I think they are, then we have no reason to value lawyers and judges having such knowledge either.

Yet the assumptions upon which these debates have proceeded are not quite right. My arguments indicate that we have to proceed on the footing that certain moral principles make it the case that the law requires what it does. The difficulty, of course, is to do so in a way that is perfectly consistent with an enviable epistemology of legal standards. There are, one suspects, all sorts of expansions and elucidations to be made, and all sorts of doubts and difficulties to be stated and overcome. But I hope I have done enough, at least, to show that it will not do merely to *point out* that something along the lines of the model of principle is epistemologically bankrupt from the get-go. It is incumbent on us to *reconcile* the respective insights of the orthodox view and the model of principle. That, to be sure, was one of the focal points of my expounding the integration challenge for the legal domain. It would, therefore, be very interesting to return to the more practical aspects of our subject in light of my arguments. That, however, is an enquiry for another day.

Notes to Chapter VI

- 1 Weinrib (2012: 297-333).
- 2 Posner (1973).
- 3 See *Khorasandjian v Bush* [1993] QB 727; *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL). See generally Murphy (2010).
- 4 See further Pardalos, Migdalas, and Pitsoulis (2016).
- 5 Weinrib (2012a). See too the 'rights model' defended by Robert Stevens in his (2007).
- 6 Penner (2010: 672).
- 7 Compare Cass Sunstein's suggestion that legal discourse is, from the perspective of academic moral and political philosophy or jurisprudence, 'incompletely theorized'. See Sunstein (1996: 35-61). For further discussion of this point, see Penner (2003: 76-81).
- 8 Joseph Raz expresses the thought very well in his (2009a: 48): 'When discussing appointments to the Bench, we distinguish different kinds of desirable characteristics judges should possess. We value their knowledge of the law and their skills in interpreting laws and in arguing ways showing their legal experience and expertise. We also value their wisdom and understanding of human nature, their moral sensibility, their enlightened approach, etc. There are many other characteristics which are valuable in judges. For present purposes these two kinds are the important ones. The point is that while it is generally admitted that both are very important for judges as judges, only the first group of characteristics mentioned is thought of as establishing the legal skills of the judge.'

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